

Nos. 11-14532-CC and 11-14674-CC

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES,
Appellant and Cross-Appellee,
v.
STATE OF ALABAMA, ET AL.,
Appellees and Cross-Appellants

**On Cross-Appeals from the United States District Court
for the Northern District of Alabama
Case No. 2:11-cv-2746-SLB**

**ALABAMA AND GOVERNOR BENTLEY'S
PETITION FOR REHEARING *EN BANC***

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September 10, 2012

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

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Alabama Immigration Lawyers Association

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STATEMENT OF COUNSEL

I respectfully believe, based on a reasoned and studied professional judgment, that this appeal involves two questions of exceptional importance:

(1) Do the federal immigration statutes impliedly preempt state laws, like ALA. CODE §31-13-13 and GA. CODE ANN. §§16-11-200 to - 202, that make it a crime for a State's lawful residents to harbor, transport, or conceal persons who are violating those federal immigration statutes, or to induce those persons to come into the State?

(2) Do the federal immigration statutes impliedly preempt state laws, like ALA. CODE §31-13-26, that alter state common law to make contracts unenforceable when state residents knowingly enter into them with persons who are violating federal immigration statutes?

I also respectfully believe, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 993 (1976); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

s/ John C. Neiman, Jr.

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Alabama Solicitor General
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PRELIMINARY STATEMENT

Like the companion cases in Nos. 11-13044 & 11-14535, this appeal raises important questions the *en banc* Court should answer. In recent years, States throughout the country have tried to address, through laws like Arizona's SB1070, Georgia's HB87, and Alabama's HB56, the problems they face because of illegal immigration. The United States and private plaintiffs have responded by suing several of these States in federal court, arguing that federal immigration statutes preempted these laws. Recognizing the importance of these issues, the Supreme Court granted certiorari on them the first time it had the opportunity to do so. The resulting opinion in *Arizona v. United States*, 132 S. Ct. 2492 (2012), made clear that some of the provisions in these statutes are facially preempted, while others are not. Yet the decision did not address, either expressly or implicitly, questions surrounding other critical provisions found in these laws.

A panel of this Court has now struck down several of these provisions. In this case and No. 11-13044, the panel invalidated provisions of Alabama and Georgia law that make it a state-law crime to harbor persons who are present in the country in violation of the federal immigration laws. In this case, the same panel also invalidated a separate provision, unique to Alabama, that renders contracts unenforceable when lawful residents knowingly enter into them with persons who are not lawfully present. In a third case, No. 11-14535, on which Alabama officials

are simultaneously seeking rehearing, the same panel also erroneously struck down, on equal-protection grounds, a provision designed to provide Alabama with aggregate data on the number of unlawfully present persons in its public schools.

The panel's conclusions on these issues are important and wrong. They were not compelled by *Arizona*, and they were contrary to other precedents. They put the law of this Circuit at odds with the law in other jurisdictions, and they expand the doctrine of implied preemption in ways that will be detrimental in other areas of the law. For the same reasons the Supreme Court granted certiorari in *Arizona*—and for the same reasons the Fifth Circuit recently granted *en banc* rehearing in another case addressing immigration-preemption issues—these questions deserve the panel's reconsideration or the full Court's review.

ISSUES FOR REHEARING IN NOS. 11-14532 AND 11-14674

I. Harboring. Congress makes it a federal crime to harbor, conceal, or transport persons who are violating federal immigration laws, and Congress authorizes state police to arrest people who violate this federal prohibition. In so doing, has Congress impliedly preempted state legislatures from complementing this enforcement effort by passing laws making it a state-law crime for a State's citizens to harbor, conceal, or transport these same persons, or to induce them to come into the State?

II. Contracts. No federal statute expressly requires state courts to enforce any and all contracts that a State’s residents knowingly enter into with persons who are violating federal immigration law. Has Congress nonetheless impliedly preempted state courts from declining to enforce those contracts?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The panel opinion addresses several provisions of Alabama Act No. 2011-535, also known as House Bill 56 or “HB56.” Before the Act took effect, the United States filed this lawsuit against Alabama and its Governor, seeking to enjoin a number of the Act’s sections on preemption grounds. The panel’s decision upholds some of these sections and strikes down others. Its rulings in several of those respects were dictated by the Supreme Court’s decision in *Arizona* and do not warrant rehearing. *See* Exh. A at 14-21, 35-37. This statement focuses on the two provisions—one dealing with harboring, the other with contracts—on which the panel’s preemption ruling was sufficiently important to justify rehearing.

I. The harboring provision

The Act’s harboring provision, Section 13(a), is codified at §31-13-13(a) of the Alabama Code. It makes it a state-law crime for persons to knowingly harbor, conceal, or transport aliens who are unlawfully present in the United States. A related subsection specifies that “[i]n the enforcement of this section,” a state “law enforcement officer shall not attempt to independently make a final determination

of whether an alien is lawfully present in the United States.” ALA. CODE §31-13-13(g). Instead, officers shall determine an alien’s status “pursuant to” a federal statute that requires the federal government to respond to immigration-status inquiries from state law-enforcement officials. *Id.* (citing 8 U.S.C. §1373(c)). The harboring provision’s full language appears in an appendix to this petition.

II. The contracts provision

Section 27 of the Act, codified at §31-13-26 of the Alabama Code, alters Alabama common law to make certain contracts unenforceable. This section provides that with specified exceptions, “[n]o court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the United States, if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into.” ALA. CODE §31-13-26(a). Like the harboring provision, the contracts provision says that a court’s determination of whether the contracting party was lawfully present “shall be made by the federal government, pursuant to 8 U.S.C. §1373(c).” *Id.* §31-13-26(d). The contracts provision’s full text appears in the statutory appendix.

III. The district court’s and panel’s decisions

This appeal and cross-appeal resulted from the District Court’s ruling on the United States’ motion for a preliminary injunction. The District Court enjoined the

harboring provision but upheld the contracts provision. *See* Doc 93 – Pg 70-86, 100-09. The United States appealed the contracts ruling, and Alabama and the Governor cross-appealed on harboring. The United States asked a motions panel from this Court to enjoin the contracts provision during the appeal, but that panel denied that request. *See* Exh. B.

Before briefing was completed in this Court, the Supreme Court granted certiorari in *Arizona*. Because the Supreme Court would address several Arizona provisions that had parallels at issue in this case, the panel announced at oral argument that it would not issue its opinion before the Supreme Court did. On the next day, however, the panel modified the motions panel's prior order and enjoined the contracts provision pending the panel's final resolution of the case. *See* Exh. C.

The panel issued its final opinion shortly after the Supreme Court decided *Arizona*. *See* Exh. A. Although the panel upheld several of the challenged provisions, it held that both the harboring provision and the contracts provision were preempted.

On harboring, the panel relied heavily on its opinion in a companion case decided the same day, No. 11-13044, which struck down a similar Georgia law. In both the Alabama and Georgia decisions, the panel expressly held that the state laws were preempted because they conflicted with federal law. But the panel also used language at least suggesting that Congress has completely occupied this field

and thus excluded all state regulation in this area. A federal statute, 8 U.S.C. §1324(a)(1)(A), also makes it a crime to harbor, conceal, or transport unlawfully present aliens. That statute expressly allows state officers to arrest people who violate it. “[T]he inference from these enactments,” the panel concluded in both the Alabama and Georgia cases, “is that the role of the states is limited to arrest for violations of federal law.” Exh. A at 22. The panel said that state-law provisions of this variety conflict with the discretion granted to the President to decide how to prosecute federal harboring violations. *See id.* at 24-25.

Meanwhile, in a break from the result reached by both the District Court and the prior motions panel, the panel found the contracts provision problematic because it “crafted a calculated policy of expulsion, seeking to make the lives of unlawfully present aliens so difficult as to force them to retreat from the state.” *Id.* at 41. The court held that provisions with that effect are “preempted by the inherent power of the federal government to regulate immigration” and by federal statutes giving the Executive Branch the power to “determine who must be removed and who may permissibly remain.” *Id.* at 41, 44.

ARGUMENT AND AUTHORITIES

Immigration preemption is one of the most important issues currently before the courts. The Supreme Court recognized as much when it granted certiorari in *Arizona*, before any circuit split had arisen and while the case was still in an

interlocutory, preliminary-injunction posture. The Fifth Circuit recognized as much, too, when it granted *en banc* rehearing to address immigration-preemption issues the Supreme Court left open in *Arizona*. See *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, *reh'g en banc granted*, 2012 WL 3085535 (5th Cir. July 31, 2012). This Court should follow that same path here. The panel's rulings on harboring and contracts go far beyond the principles set forth in *Arizona*. They reflect theories of preemption that will have untoward effects in many other contexts. Those theories should not become the law in this Circuit in any event, but in the very least they should not become the law without reconsideration by the panel or endorsement by the *en banc* Court.

I. Rehearing is warranted on harboring.

In striking down the harboring provision, the panel addressed a question of nationwide importance. Serious human-trafficking problems arise when a State's citizens harbor and transport persons who are not lawfully present. It thus should come as no surprise that at least six other States have laws similar to the Alabama and Georgia statutes prohibiting their citizens from engaging in those activities. See ARIZ. STAT. ANN. §13-2929; IND. CODE ANN. §35-44.1-5-4; MO. STAT. ANN. §577.675; 21 OKLA. STAT. ANN. §446; UTAH CODE ANN. §76-10-2901; S.C. CODE ANN. §16-9-460. The panel appears to be the first Court of Appeals to declare

provisions of this sort preempted. That consideration is enough, by itself, to warrant further review.

In any event, the panel's decision was wrong. Neither of the panel's preemption theories supports its end conclusion that States lack the power to address these problems.

1. As an initial matter, the panel effected a significant change in this Court's jurisprudence when, without using the words "field preempted," it grounded its ruling in field-preemption precedents. In the portion of *Arizona* the panel cited, the Supreme Court invalidated, under the field-preemption doctrine, an Arizona provision making it a crime for unlawfully present persons to violate federal registration laws. *See* Exh. A at 23 (citing *Arizona*, 132 S. Ct. at 2501). And in the portion of *Pennsylvania v. Nelson* the panel cited, the Supreme Court held that a Pennsylvania sedition statute was field-preempted as well. *See id.* at 24 (citing *Nelson*, 350 U.S. 497, 499, 76 S. Ct. 477, 479 (1956)).

Yet field preemption is not a viable theory when it comes to the harboring provision. As the Court explained in *Arizona*, "[f]ield preemption reflects a congressional decision to foreclose *any* state regulation in the area, even if it is parallel to federal standards." 132 S. Ct. at 2502 (emphasis added). Whereas the federal registration and sedition statutes considered in *Arizona* and *Nelson* reflect a decision to preempt those fields in that way, the federal harboring prohibition

reflects precisely the opposite choice. As the panel conceded, the language of the federal harboring prohibition shows that Congress affirmatively “chose to allow state officials to arrest” persons for violating the federal prohibition. Exh. A at 22 (citing 8 U.S.C. §1324(c)). Given that Congress affirmatively and expressly *wanted* individual state officers to arrest people they believed to be harboring unlawfully present aliens, it is impossible to say Congress foreclosed “*any* state regulation in the area.” *Arizona*, 132 S. Ct. at 2502 (emphasis added). And it is implausible to suggest that Congress simultaneously invited on-the-spot regulation by individual state police officers, yet implicitly intended to exclude regulation through the considered judgments of state legislatures.

Nevertheless, at least one court already has read the panel’s citation of those field-preemption precedents as holding that laws in this area are field-preempted; and that result is reason by itself to grant rehearing. The *Arizona* district court originally rejected the United States’ preemption argument against the Arizona harboring provision, and the United States did not even appeal. *See United States v. Arizona*, 703 F. Supp. 2d 980, 1002-04 (D. Ariz. 2010). Yet after allowing that provision to operate for more than two years, the Arizona district court enjoined it just last week. The cited authority for doing so was the panel decisions in these cases, which the *Arizona* court claimed held that the Alabama and Georgia

provisions were “field preempted.” *United States v. Arizona*, Order at 8 (Doc. 757), No. 2:10-cv-01061-SRB (D. Ariz. Sept. 5, 2012).

2. The panel compounded its error by holding that these state laws are also conflict-preempted. It has long been the law that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” *United States v. Lanza*, 260 U.S. 377, 382, 43 S. Ct. 141, 142 (1922). In light of that principle, state-law prohibitions conflict with and are preempted by their federal-law parallels only if simultaneous compliance is impossible or the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *DeCanas*, 424 U.S. at 363, 96 S. Ct. at 940 (internal quotation marks omitted). Normally, Congress’s decision to enact its own law prohibiting an activity creates the precise opposite of conflict-preemption. In this situation, the state and federal laws have the *same* “purposes and objectives.” *Id.*

The panel’s contrary analysis cannot be squared with the way federalism works. The panel reasoned that state harboring provisions are preempted because the federal harboring statute establishes “a comprehensive framework” for prohibiting harboring. Exh. A at 22. The panel also drew the preemptive inference from the federal statute’s decision to “confine the prosecution” of federal harboring crimes “to federal court,” by “the appropriate United States Attorney.”

Id. at 24-25. But both of those things are just as true of nearly every federal statute that defines crimes. The federal drug-distribution statutes, for example, are “comprehensive.” *See* 21 U.S.C. §841. Only a U.S. Attorney can prosecute the crimes they create, and only in federal court. Yet no one thinks those laws preempt parallel state laws making drug distribution a state-law crime.

The panel held that federal immigration law preempts *any* attempt by a State to regulate these activities, so the panel’s concerns about certain differences between the state and federal provisions were ultimately, as the panel itself conceded, irrelevant to its end conclusion. *See* Exh. A at 28 n.11. At any rate, these purported differences do not render these state laws preempted. For its part, the Alabama statute says four times that its language “should be interpreted consistent with 8 U.S.C. §1324(a)(1)(A).” ALA. CODE §31-13-13(a)(1)-(4). But even if the laws were meaningfully different and those differences led to preemption-creating conflicts, the right way to respond would not be to strike down the entire Alabama provision. It would be to “sever its problematic portions while leaving the remainder intact.” *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329, 126 S. Ct. 961, 967 (2006). Thus, on rehearing this Court should take up both the broader question whether provisions like these can ever be valid and the narrower question whether Alabama’s law is different from the federal provision in ways that require a more narrowly tailored injunction.

Federalism concerns make it all the more imperative to rehear this matter. Much more so than the provisions the Supreme Court considered in *Arizona*, harboring prohibitions implicate traditional state interests. The primary conduct these statutes regulate is not that of unlawfully present aliens, but rather of the State's own lawful residents, and States have a compelling interest to regulate that conduct. It is exceedingly difficult for States to maintain order when they have no power to stop their citizens from helping people break the law. Both the harborers and the harbored tend to commit crimes to perpetuate their concealment. When authorities eventually locate the people who are concealed, confrontations follow. Those confrontations are not pleasant for the law-abiding people who live in the communities where they occur. States should have the power to stop their citizens from undermining the rule of law in this way.

II. Rehearing also is warranted on the contracts provision.

Although the contracts provision is unique to Alabama, the panel's invalidation of it is equally worthy of rehearing. The panel believed that this provision embodied "a calculated policy of expulsion, seeking to make the lives of unlawfully present aliens so difficult as to force them to retreat from the state." Exh. A at 41. The panel held that the provision was "preempted by the inherent power of the federal government to regulate immigration" and by federal statutes giving the Executive Branch the power to "determine who must be removed and

who may permissibly remain.” *Id.* at 41, 44. That reasoning was consistent with analysis offered by a recent Fifth Circuit panel, which struck down a local ordinance that prohibited landlords from renting apartments to persons who are not lawfully present. *See Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, *reh’g en banc granted*, 2012 WL 3085535 (5th Cir. July 31, 2012). But the *en banc* Fifth Circuit has decided to reconsider that analysis, and this Court should do the same.

The panel’s “regulation of immigration” theory, like the Fifth Circuit’s in *Villas at Parkside Partners*, is contrary to the Supreme Court’s decision in *DeCanas*. As Judge Elrod noted in her Fifth Circuit dissent, in *DeCanas* “the Court narrowly defined a” preempted “regulation of immigration as ‘essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.’” 675 F.3d at 827 (quoting *DeCanas*, 424 U.S. at 355, 96 S. Ct. at 936). Like the housing ordinance in the Fifth Circuit case, the contracts provision does not determine who should or should not be admitted into the country in the first place, and it does not determine the conditions under which a *legal* entrant may remain. Indeed, the contracts provision expressly defers to the federal government’s determination of whether a person is lawfully present. *See* ALA. CODE §31-13-26(d) (citing 8 U.S.C. §1373(c)).

It is no answer to suggest, as the panel did, that the provision nonetheless conflicts with Congress's exclusive removal power because it has the practical effect of creating incentives for unlawfully present aliens to depart the State. *See* Exh. A at 37-46. If that were the test, then *DeCanas* and the Supreme Court's later decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), would have come out the other way. In both those cases, States passed statutes that made it effectively impossible for unauthorized aliens to make a living within their borders. *See DeCanas*, 424 U.S. at 352, 96 S. Ct. at 935; *Whiting*, 131 S. Ct. at 1975-77. A State can create no more powerful an incentive for an unlawfully present person to depart. Yet *DeCanas* and *Whiting* held that States could, consistent with the Constitution, address "the deleterious effects" illegal immigration has "on its economy" by prohibiting its resident businesses from knowingly employing unlawfully present aliens in this way. *DeCanas*, 424 U.S. at 357, 96 S. Ct. at 937. It necessarily follows that Alabama can, without running afoul of the Constitution, address those same concerns by precluding its resident businesses from knowingly entering into contracts with those same persons.

Indeed, the incentives the contracts provision creates for unlawfully present persons to leave Alabama are not nearly as powerful as the incentives created by the provisions in *DeCanas* and *Whiting*. The contracts provision does not prevent unlawfully present persons from entering into garden-variety retail transactions.

Nor does it render all their contracts unenforceable. It instead makes their contracts unenforceable only if *the other party* knows that they are unlawfully present. And although the provision undoubtedly denies unlawfully present persons the full benefits of state contract law, nothing in federal law precludes States from taking that step. The former Fifth Circuit, in a decision that is binding on this Court, held that a State generally may “deny illegal aliens its largess” without fear of preemption. *Doe v. Plyler*, 628 F.2d 448, 453 (5th Cir. 1980), *aff’d in non-pertinent part*, *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982).

As the current Fifth Circuit signaled when it granted *en banc* rehearing in its case, the theory of immigration preemption espoused by the panel there—and, correspondingly, by the panel here—goes beyond the limited principles set forth in *Arizona*. That regulation-of-immigration theory could preclude States from taking almost any step to address the costs they are currently bearing as a result of illegal immigration. Particularly because a motions panel of this Court originally declined to enjoin the contracts provision pending appeal, *see* Exh. B, this Court should follow the Fifth Circuit’s lead and reconsider the merits panel’s theory *en banc*.

CONCLUSION

This Court should grant rehearing *en banc* or panel rehearing.

Respectfully submitted,

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OF COUNSEL

Statutory Appendix

ALA. CODE §31-13-13 - Concealing, harboring, shielding, etc., unauthorized aliens.

(a) It shall be unlawful for a person to do any of the following:

(1) Conceal, harbor, or shield from detection or attempt to conceal, harbor, or shield from detection or conspire to conceal, harbor, or shield from detection an alien in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law. This subdivision should be interpreted consistent with 8 U.S.C. §1324(a)(1)(A).

(2) Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such alien's coming to, entering, or residing in the United States is or will be in violation of federal law. This subdivision should be interpreted consistent with 8 U.S.C. §1324(a)(1)(A).

(3) Transport, or attempt to transport, or conspire to transport in this state an alien in furtherance of the unlawful presence of the alien in the United States, knowingly, or in reckless disregard of the fact, that the alien has come to, entered, or remained in the United States in violation of federal law. Conspiracy to be so transported shall be a violation of this subdivision. This subdivision should be interpreted consistent with 8 U.S.C. §1324(a)(1)(A).

(4) It shall not be a violation of this section for a religious denomination having a bona fide nonprofit religious organization in the United States, or the agents or officers of the denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year. This subdivision should be interpreted consistent with 8 U.S.C. §1324(a)(1)(C).

(b) Any person violating this section is guilty of a Class A misdemeanor for each unlawfully present alien, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or is attempting to facilitate.

(c) A person violating this section is guilty of a Class C felony when the violation involves five or more aliens, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or is attempting to facilitate.

(d) Notwithstanding any other law, a law enforcement agency may securely transport an alien whom the agency has received verification from the federal government pursuant to 8 U.S.C. §1373(c) is unlawfully present in the United States and who is in the agency's custody to a state approved facility, to a federal facility in this state, or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial or executive authorization from the Governor before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside this state.

(e) Notwithstanding any other law, any person acting in his or her official capacity as a first responder or protective services provider may harbor, shelter, move, or transport an alien unlawfully present in the United States pursuant to state law.

(f) Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of this section, and the gross proceeds of such a violation, shall be subject to civil forfeiture under the procedures of Section 20-2-93.

(g) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. §1373(c). A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

(h) Any record that relates to the immigration status of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. §1373(c) shall constitute proof of that alien's status. A court of this state

shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States.

ALA. CODE §31-13-33 - Rental agreements with unauthorized aliens prohibited.

Notwithstanding any other provision of law to the contrary, it shall be unlawful for a person to harbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States.

ALA. CODE §31-13-26 - Enforcement of certain contracts prohibited.

(a) No court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the United States, if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into, and the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining.

(b) This section shall not apply to a contract for lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin.

(c) This section shall not apply to a contract authorized by federal law, to a contract entered into prior to May 18, 2012, or to a contract for the appointment or retention of legal counsel in legal matters.

(d) In proceedings of the court, the determination of whether an alien is unlawfully present in the United States shall be made by the federal government, pursuant to 8 U.S.C. §1373(c). The court shall consider only the federal government's determination when deciding whether an alien is unlawfully present in the United States. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and

may request the federal government to provide further automated or testimonial verification.

Exhibit A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 11-14532; 11-14674

D.C. Docket No. 2:11-cv-02746-SLB

UNITED STATES OF AMERICA,

Plaintiff - Appellant
Cross Appellee,

versus

STATE OF ALABAMA,
GOVERNOR OF ALABAMA,

Defendants - Appellees
Cross Appellants,

NATIONAL FAIR HOUSING ALLIANCE, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Alabama

(August 20, 2012)

Before WILSON and MARTIN, Circuit Judges, and VOORHEES,* District Judge.

WILSON, Circuit Judge:

On June 9, 2011, Governor Robert Bentley signed into law House Bill 56, titled the “Beason–Hammon Alabama Taxpayer and Citizen Protection Act” (H.B. 56). The stated purpose of the legislation is to discourage illegal immigration within the state and maximize enforcement of federal immigration laws through cooperation with federal authorities. *See* Ala. Code § 31-13-2. A total of ten provisions of H.B. 56 are at issue in the appeal before us,¹ some of which have been amended by an act of the Alabama legislature, House Bill 658 (H.B. 658), which Governor Bentley signed into law on May 18, 2012.

Section 10² of H.B. 56 creates a new state crime for an unlawfully present alien’s “willful failure to complete or carry an alien registration document.” Ala. Code § 31-13-10(a). An unlawfully present alien violates section 10 when he or she is found to be in violation of 8 U.S.C. §§ 1304(e) or 8 U.S.C. § 1306(a), the

* Honorable Richard L. Voorhees, United States District Judge for the Western District of North Carolina, sitting by designation.

¹ Additional provisions have been challenged in the related case involving private plaintiffs, Case Nos. 11-14535 and 11-14675. Those additional sections are described in that companion opinion.

² Consistent with how this case has been presented, we reference the originally designated sections of H.B. 56 rather than the Alabama Code section where the provisions are currently housed.

federal provisions governing alien registration. A violation of this provision carries with it a fine of up to \$100 and not more than thirty days in prison. Ala. Code § 31-13-10(f).

Section 11 criminalizes an “unauthorized” alien’s application for, solicitation of, or performance of work, whether as an employee or independent contractor, inside the state of Alabama. Ala. Code § 31-13-11(a). An alien who is authorized to work within the United States is not subject to penalty under this provision, *id.* § 31-13-11(d), and section 11 is otherwise construed as consistent with 8 U.S.C. § 1324a, *id.* § 31-13-11(j). The United States has challenged the criminalization of the underlying conduct described in subsection (a).

Through section 12, Alabama requires officers to determine a lawfully seized individual’s immigration status when the officer has reasonable suspicion that the seized individual is unlawfully present in the United States. *Id.* § 31-13-12(a). The immigration-status determination is made pursuant to a request under 8 U.S.C. § 1373(c). *Id.* A similar request is required for any alien arrested and booked into custody. *Id.* § 31-13-12(b).

Section 13 creates three new state crimes similar to those codified in 8 U.S.C. § 1324(a)(1)(A). First, it criminalizes the concealment, harboring, or shielding from detection of any alien, as well as any attempt to do so. Ala. Code

§ 31-13-13-(a)(1). Second, it criminalizes the act of encouraging or inducing an alien to “come to or reside in” Alabama. *Id.* § 31-13-13(a)(2). Third, it criminalizes transporting, attempting to transport, or conspiring to transport an alien “in furtherance of the unlawful presence of the alien in the United States.” *Id.* § 31-13-13(a)(3). An individual who engages in “conspiracy to be so transported” is also subject to prosecution. *Id.* Each individual crime requires knowledge or reckless disregard of the fact that the alien is unlawfully present, *see id.* § 31-13-13(a)(1)–(3), and H.B. 658 amended the statute to clarify that each crime is to be interpreted consistent with 8 U.S.C. § 1324(a)(1)(A). As originally enacted, section 13 also criminalized certain instances of entering into a rental agreement with an unlawfully present alien. An amendment included in H.B. 658 moved this provision to a different part of the Alabama Code but left it substantively intact. *See* H.B. 658, § 6.

The next two provisions at issue, section 16 and section 17, concern employment of undocumented workers. Section 16 disallows an employer’s state tax deduction for wages and compensation paid to an alien unauthorized to work in the United States. Ala. Code § 31-13-16(a). An employer who knowingly fails to comply with this requirement is “liable for a penalty equal to 10 times” the deduction claimed. *Id.* § 31-13-16(b). Section 17 similarly concerns employment,

and it labels as a “discriminatory practice” an employer’s act of firing or failing to hire a U.S. citizen or an alien authorized to work while the employer simultaneously employs or hires an alien unauthorized to work in the country. *Id.* § 31-13-17(a). An employer who engages in this practice is subject to a state civil action for compensatory relief, *id.* § 31-13-17(b), and the losing party in that action must pay court costs and attorneys’ fees, *id.* § 31-13-17(c).

Section 18 amends a state provision governing drivers’ licenses, Ala. Code § 32-6-9. The preexisting statute required all drivers to possess a drivers’ license and display it upon the request of a proper state official. *Id.* § 32-6-9(a). Section 18 adds that, when a driver is found to be in violation of subsection (a), a reasonable effort must be made within forty-eight hours to determine that driver’s citizenship and, if an alien, whether the individual is permissibly present in the country. *Id.* § 32-6-9(c).³

Section 27 prohibits state courts from enforcing a contract to which an unlawfully present alien is a party, provided that the other party “had direct or constructive knowledge” of the alien’s unlawful presence and that performance of the contract would require the alien to remain in the state for more than twenty-

³ Originally, the statute also required a person arrested under subsection (a) to be taken to a magistrate in the event the officer could not determine whether the arrestee possessed a valid license. H.B. 658 struck that provision.

four hours after its formation. *Id.* § 31-13-26(a). Section 27 does contain exemptions from its scope, including contracts for overnight lodging, purchase of food, medical services, or transportation to facilitate the alien's return to his country of origin. *Id.* § 31-13-26(b). Additionally, any federally authorized contract is outside the scope of section 27, as are any contracts entered into prior to the section's enactment and any contracts for retention of legal counsel. *Id.* § 31-13-26(c); H.B. 658, § 1.

Next, section 28 provides a process for schools to collect data about the immigration status of students who enroll in public school. Schools are required to determine whether an enrolling child "was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States." *Id.* § 31-13-27(a)(1). That determination is made based on the birth certificate of the child. *Id.* § 31-13-27(a)(2). If none is available, or if the certificate reflects that "the student was born outside . . . the United States or is the child of an alien not lawfully present in the United States," then the enrolling child's parent or guardian must notify the school of the "actual citizenship or immigration status of the student under federal law." *Id.* § 31-13-27(a)(3). This notification consists of (a) official citizenship or immigration documentation and (b) an attestation under penalty of perjury that the document identifies the child. *Id.* § 31-13-27(a)(4). If

the statutory notification is not provided, then the student is presumed to be “an alien unlawfully present in the United States.” *Id.* § 31-13-27(a)(5).

Finally, as originally enacted, section 30 prohibited unlawfully present aliens from entering, or attempting to enter, into a “business transaction” with the state or a political subdivision thereof. *Id.* § 31-13-29(b) (2011), *amended by* H.B. 658, § 1. A business transaction was defined as including “any transaction,” except for the application of marriage licenses. *Id.* § 31-13-29(a). As amended by H.B. 658, the provision now prohibits unlawfully present aliens from entering, or attempting to enter, into a “public records transaction” with the state or a political subdivision thereof. H.B. 658, § 1. A public records transaction is defined as applying for or renewing “a motor vehicle license plate,” “a driver’s license or nondriver identification card,” “a business license,” “a commercial license,” or “a professional license.” *Id.* Any person who violates this prohibition, or any person who attempts to enter into a public records transaction on behalf of an unlawfully present alien, can be charged with a Class C felony. Ala. Code § 31-13-29(d).

Several additional provisions also bear on the application and interpretation of H.B. 56 as a whole. Section 2 provides the overall goals and findings of the

legislature in enacting the law.⁴ Section 5 prohibits state officials from adopting any policy that would restrict enforcement of federal immigration law to its full extent and provides for a civil cause of action to challenge alleged lax enforcement of the law. *See id.* § 31-13-5. Section 6 similarly prohibits state officials from adopting relaxed enforcement policies with regard to Alabama's own immigration provisions and provides an analogous civil cause of action. *See id.* § 31-13-6. Both of these sections impose a duty on state officials to report violations of

⁴ Section 2 states in full:

The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status. Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state. The State of Alabama further finds that certain practices currently allowed in this state impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama. Therefore, the people of the State of Alabama declare that it is a compelling public interest to discourage illegal immigration by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws. The State of Alabama also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

Ala. Code § 31-13-2.

Alabama's immigration laws, and failure to do so could result in a conviction under Ala. Code § 13A-10-2 for obstructing government operations. *Id.* §§ 31-13-5(f), -6(f). The results of Alabama's immigration-enforcement scheme are reported periodically pursuant to section 24, which requires the Alabama Department of Homeland Security to summarize the "progress being made in the effort to reduce the number of illegal aliens in the State of Alabama" in a public report. *Id.* § 31-13-23.

Before the challenged provisions became effective, the United States filed suit seeking to enjoin them on the ground that they are an impermissible attempt to regulate immigration and are, therefore, preempted by federal law. Around the same time, a group of private plaintiffs filed a separate preenforcement challenge to H.B. 56 asserting preemption and other constitutional claims. (Although many of the issues overlap, these appeals are not consolidated, and the case involving the private plaintiffs is resolved in a companion case, Nos. 11-14535, 11-14675.) Along with its complaint, the United States filed a motion for a preliminary injunction to preserve the status quo until final adjudication. The United States sought to enjoin enforcement of sections 10, 11(a), 12(a), 13, 16, 17, 18, 27, 28, and 30. At the time of filing, the private plaintiffs had already filed a motion for a preliminary injunction, and the district court consolidated the two cases for

purposes of deciding the preliminary injunction issues.

After briefing and argument, the district court granted in part and denied in part the motions for preliminary injunction. The district court found a likelihood of success in the preemption challenge to sections 11(a), 13, 16, and 17 and enjoined their enforcement; it did not find a likelihood of success in the preemption challenge to sections 10, 12(a), 18, 27, 28, and 30.⁵ *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011).

The United States and private plaintiffs appealed the district court's denial of a preliminary injunction, and Alabama cross-appealed the district court's grant of preliminary injunctive relief. After filing its notice of appeal, the United States sought from this court an injunction pending appeal to prevent enforcement of the sections for which the district court denied an injunction. A panel of this court granted in part the motion for injunction pending appeal, enjoining enforcement of sections 10 and 28. Later, after briefing and oral argument, we modified the injunction pending ultimate disposition of this appeal and enjoined enforcement of sections 27 and 30. As a result of the rulings, only two challenged provisions—sections 12 and 18—are currently being enforced, each of which

⁵ In the case of the private plaintiffs, the district court further found that sections 8, 10(e), 11(e)–(g), and 13(h) should be enjoined. *Hispanic Interest Coal. of Ala. v. Bentley*, ___ F. Supp. 2d ___, No. 11-2484, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011).

provides for law enforcement inquiries into the immigration status of certain individuals suspected of criminal activity.⁶

Having closely considered the positions and new briefing of the parties in light of the recent decision in *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012), we conclude that most of the challenged provisions cannot stand. Specifically, we conclude that the United States is likely to succeed on its preemption claims regarding sections 10, 11(a), 13(a), 16, 17, and 27. We therefore affirm the district court's decision as to sections 11(a), 13(a), 16, and 17. We reverse the district court's decision as to sections 10 and 27 and remand for the entry of a preliminary injunction. We conclude, however, that the United States has not at this stage shown that sections 12(a), 18, or 30 are facially invalid. We therefore affirm the district court's decision not to preliminarily enjoin these provisions. Finally, because we find section 28 violative of the Equal Protection Clause in the companion case brought by private plaintiffs, we dismiss the United States's appeal as to this section as moot without deciding whether that provision is preempted. In sum, we affirm in part and reverse in part the order of the district

⁶ In supplemental briefing following the Supreme Court's decision in *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012), the United States declared that it will no longer pursue the appeal of sections 12 and 18. Because neither party has requested dismissal of the appeal, we will address the merits of the preemption claim with respect to sections 12 and 18, recognizing the concession of the United States that it will not succeed on those claims.

court, and we dismiss in part the appeal.

I. Standard of Review

We review a district court's grant of a preliminary injunction for abuse of discretion. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Legal determinations underlying the grant of an injunction are reviewed *de novo*, and factual determinations are reviewed for clear error. *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171–72 (11th Cir. 2002).

II. Discussion

A preliminary injunction may be granted to a moving party who establishes “(1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Robertson*, 147 F.3d at 1306. We address these factors in turn, focusing in particular on the most contested determination—whether the United States is likely to succeed on the preemption claims.

A. Likelihood of Success on the Merits

Our Constitution provides Congress with the power to preempt state law, *see* U.S. Const. art. VI cl. 2, and that preemption may be express or implied.

Although preemption law cannot always be neatly categorized, we generally recognize three classes of preemption. *See Browning*, 522 F.3d at 1167 (recognizing the doctrines of express, field, and conflict preemption). The first, express preemption, arises when the text of a federal statute explicitly manifests Congress's intent to displace state law. *Id.* The second, field preemption, "occurs when a congressional legislative scheme is 'so pervasive as to make the reasonable inference that Congress left no room for the states to supplement it.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)). To determine the boundaries that Congress sought to occupy within the field, we look to "the federal statute itself, read in the light of its constitutional setting and its legislative history." *De Canas v. Bica*, 424 U.S. 351, 360 n.8, 96 S. Ct. 933, 938 (1976) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 78–79, 61 S. Ct. 399, 410 (1941) (Stone, J., dissenting)).

The third, conflict preemption, may arise in two ways. First, conflict preemption can occur "when it is physically impossible to comply with both the federal and the state laws." *Browning*, 522 F.3d at 1167. Conflict preemption may also arise "when the state law stands as an obstacle to the objective of the federal law." *Id.* We use our judgment to determine what constitutes an unconstitutional obstacle to federal law, and this judgment is "informed by

examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294 (2000).

In determining the extent to which federal statutes preempt state law, we are “guided by two cornerstones.” *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194 (2009). First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996)). Second, we assume “that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.* at 565, 116 S. Ct. at 1194–95 (internal quotation marks and alterations omitted); *see also Arizona*, 132 S. Ct. at 2501. With these considerations in mind, we turn to the merits of whether the United States is likely to succeed on its claims that sections 10, 11(a), 12(a), 13, 16, 17, 18, 27, 28, and 30 are preempted by federal law.

1. Section 10

Section 10 criminalizes an unlawfully present alien’s willful failure to complete or carry registration documents in violation of 8 U.S.C. §§ 1304(e), 1306(a). The district court rejected the United States’s preemption argument, finding that section 10 is a permissible complement to federal law. This court

enjoined enforcement of section 10 pending appeal. Having the benefit of the Supreme Court's decision in *Arizona*, we conclude that the district court erred in finding that the United States was not likely to succeed on its preemption challenge to section 10.⁷

In *Arizona v. United States*, the Supreme Court recently found preempted section 3 of Arizona's Senate Bill 1070 (S.B. 1070), which forbade "willful failure to complete or carry an alien registration document" in violation of 8 U.S.C. §§ 1304(e) or 1306(a). 132 S. Ct. at 2501 (quoting Ariz. Rev. Stat. § 13-1509(A)). After identifying the federal statutes that Congress enacted to create the present alien-registration scheme, the Court concluded that the federal government "has occupied the field of alien registration." *Id.* at 2502. Congress promulgated standards for alien registration as well as "punishment for noncompliance." *Id.* As a result of field preemption, Congress manifestly "foreclose[d] any state regulation in the area, even if it is parallel to federal standards." *Id.*

Like section 3 of S.B. 1070, section 10 intrudes into the field of alien registration, which the Supreme Court has confirmed is an area of exclusive federal concern. Because federal law occupies the field, "even complementary

⁷ In supplemental briefing after *Arizona*, Alabama has acknowledged that section 10 is preempted.

state regulation is impermissible.” *Id.* As was the case in *Arizona*, any attempt by Alabama to enforce its own requirements would dilute federal control over immigration enforcement and detract from Congress’s comprehensive scheme. *Id.* The Court has made clear that a state’s shared goal and adoption of federal standards is insufficient to save its statute from a finding of field preemption. *Id.* at 2502–03. The Court’s holding that federal alien registration law occupies the field necessarily requires that state regulations in that area are preempted. We therefore conclude, consistent with *Arizona*, that section 10 is preempted by federal law.

2. Section 11(a)

Section 11(a) criminalizes the knowing application for work, solicitation of work, or performance of work by an alien who is not authorized to work in the United States. The district court enjoined this section on the ground that Congress intended to curb the employment of unauthorized aliens by regulating the actions of employers who hire unauthorized workers, not the employees who acquire these jobs. The Supreme Court concluded in *Arizona* that a nearly identical provision of Arizona law was preempted, and in light of that holding, we agree with the district

court.⁸

In *Arizona*, the Supreme Court passed on section 5(C) of S.B. 1070, which made it a state misdemeanor for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” in the state. 132 S. Ct. at 2503 (quoting Ariz. Rev. Stat. § 13-2928(C)). The Court explained that Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, as “a comprehensive framework ‘combating the employment of illegal aliens.’” *Arizona*, 132 S. Ct. at 2504 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 122 S. Ct. 1275, 1282 (2002)). Notably, while federal law contemplates some consequences for unauthorized aliens who accept employment, IRCA “does not impose federal criminal sanctions on the employee side” and instead imposes criminal penalties on employers who hire unauthorized aliens. *Id.* IRCA’s regulatory scheme, along with its legislative history, compelled the Court to conclude that “Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.” *Id.*; see also *id.* (“IRCA’s framework reflects a considered judgment that making criminals

⁸ In supplemental briefing after *Arizona*, Alabama has acknowledged that section 11(a) is preempted.

out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives.”). In light of this intent, the Court found that Arizona’s law “would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.” *Id.* at 2505. As a result, it found section 5(C) preempted by federal law. *Id.*

In light of Congress’s decision that “it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment,” Alabama’s section 11(a) is preempted by federal law. *Id.* Section 11(a) cannot be meaningfully distinguished from the provision at issue in *Arizona*. Both the Alabama and Arizona provisions criminalize the application, solicitation, and performance of work by an unauthorized alien. Ala. Code § 31-13-11(a); Ariz. Rev. Stat. § 13-2928(C). This attempt to criminalize conduct that Congress has chosen not to criminalize presents an obstacle to accomplishment of federal law. *Arizona*, 132 S. Ct. at 2505. As a result, section 11(a) is preempted by federal law.

3. Section 12(a)

Pursuant to section 12, a state law enforcement officer is obligated to investigate the immigration status of lawfully seized individuals whom the officer has reasonable suspicion to believe is unlawfully present in the United States.

Neither the district court nor this court enjoined this section. Following *Arizona*, and consistent with the positions of the parties, we conclude that the United States is not likely to succeed on its challenge to section 12 in this preenforcement challenge.

In *Georgia Latino Alliance for Human Rights v. Deal (GLAHR)*, No. 11-13044, ___ F.3d ___ (11th Cir. Aug. 20, 2012), we recounted relevant aspects from the recent Supreme Court opinion in *Arizona v. United States*:

In *Arizona*, the Supreme Court rejected a preenforcement challenge to section 2(B) of S.B. 1070, which requires state officers to make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if there exists reasonable suspicion that the detained individual is an unlawfully present alien. 132 S. Ct. at 2507; *see* Ariz. Rev. Stat. § 11-1051(B). The Arizona statute contains three limitations: production of certain identification renders an individual presumptively lawfully present, Ariz. Rev. Stat. § 11-1051(B); officers may not consider race, color, or national origin except as authorized by the United States and Arizona Constitutions, *id.*; and the statute must be implemented consistently with federal law and in a manner protective of civil rights, *id.* § 11-1051(L).

Arizona clarified the principle that “[c]onsultation between federal and state officials is an important feature of the immigration system.” 132 S. Ct. at 2508. Pursuant to 8 U.S.C. § 1357(g)(10), state officers may permissibly communicate with the federal government about “the immigration status of any individual,” even absent a formalized agreement between the locality and federal government. Moreover, Congress has set up a system to provide assistance to state officers and has mandated that Immigration and Customs Enforcement (ICE) respond to state inquiries concerning the immigration status of individuals. *Arizona*, 132 S. Ct. at 2508.

Above all, Congress has “encouraged the sharing of information about possible immigration violations,” and federal law permits “a policy requiring state officials to contact ICE as a routine matter.” *Id.* The state’s failure to incorporate or reference federal enforcement priorities in its immigration-inquiry statute is irrelevant. *Id.*

The Court also explained in *Arizona* that a preenforcement challenge to the scope of detention authorized by the state statute is premature. *Id.* at 2509–10. It noted the potential problems with a state statute that would permit detention “solely to verify [an individual’s] immigration status” but noted that the state’s interpretation of its statute could remedy these concerns. *Id.* at 2509. In sum, if all the state statute requires is that state officers conduct an immigration inquiry “during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives.” *Id.* Notably, the Court left open the possibility that the interpretation and application of Arizona’s law could prove problematic in practice and refused to foreclose future challenges to the law. *Id.* at 2510.

GLAHR, Slip Op. at 28–30.

Like the relevant Arizona provision, we are compelled to conclude that this preenforcement challenge to section 12(a) cannot succeed. As the Court confirmed in *Arizona*, it is not problematic to request information explicitly contemplated by federal law. *See Arizona*, 132 S. Ct. at 2508. While we do not foreclose any future challenge to the scope of detention eventually authorized or permitted under section 12(a), at this point we cannot conclude that the state statute “will be construed in a way that creates a conflict with federal law.” *Id.* at

2510. As a result, we reject the preenforcement challenge that section 12(a) is preempted by federal law.

4. Section 13

Section 13 creates state crimes for (1) concealing, harboring, or shielding an unlawfully present alien from detection, or attempting to do so; (2) encouraging or inducing an unlawfully present alien to “come to or reside in” Alabama; (3) transporting, attempting to transport, or conspiring to transport an unlawfully present alien, including an alien’s conspiracy to be transported; and (4) harboring an unlawfully present alien by entering into a rental agreement with that alien.⁹ The district court enjoined operation of this section on the ground it was conflict preempted by the largely analogous provisions of the INA. Even in light of the recent amendments accomplished by H.B. 658, we agree.¹⁰

⁹ Although section 6 of H.B. 658 altered the phrasing of the rental-agreement provision and moved it to another section of the Alabama Code, the parties have stipulated in district court that the preliminary injunction extends to section 6 of H.B. 658. Our discussion of section 13 therefore encompasses the rental-agreement provision, which is, for purposes of our review, substantively the same as the prior enactment.

¹⁰ Like the parties, we conclude that the challenge to section 13 is not moot in light of H.B. 658. The statutory amendments merely clarified that section 13 was to be applied consistently with federal law and moved one provision to another part of the Alabama Code. The United States has argued that section 13 is preempted because it regulates “the same type of conduct already regulated by Congress.” Response Brief of United States at 47. The amendments, which clarify that section 13 reaches only the conduct proscribed by federal law, do not affect the core preemption challenge lodged by the United States. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662, 113 S. Ct. 2297, 2301 (1993).

We first look to the intent of Congress to determine the scope of the federal immigration scheme. In *GLAHR*, we found that federal law “provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens” and summarized the relevant provisions of the INA:

Pursuant to 8 U.S.C. § 1324(a)(1)(A)(ii)–(iv), it is a federal crime for any person to transport or move an unlawfully present alien within the United States; to conceal, harbor, or shield an unlawfully present alien from detection; or to encourage or induce an alien to “come to, enter, or reside in the United States.” Any person who conspires or aids in the commission of any of those criminal activities is also punishable. *Id.* § 1324(a)(1)(A)(v). Section 1324(c) permits local law enforcement officers to arrest for these violations of federal law, but the federal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute. *See id.* § 1329. Subsection (d) of § 1324 further dictates evidentiary rules governing prosecution of one of its enumerated offenses, and subsection (e) goes so far as to mandate a community outreach program to “educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.” Rather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court. *See id.* §§ 1324(c), 1329. In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that the role of the states is limited to arrest for violations of federal law. *See De Canas*, 424 U.S. at 363, 96 S. Ct. at 940.

The comprehensive nature of these federal provisions is further evident upon examination of how § 1324 fits within the larger context of federal statutes criminalizing the acts undertaken by aliens and those who assist them in coming to, or remaining within, the United

States. Regarding the aliens themselves, § 1325, for example, imposes civil and criminal penalties for unlawful entry into the United States. Congress has similarly authorized criminal penalties for individuals who bring aliens into the United States, *id.* § 1323, aid the entry of an inadmissible alien, *id.* § 1327, and import an alien for an immoral purpose, *id.* § 1328. In enacting these provisions, the federal government has clearly expressed more than a “peripheral concern” with the entry, movement, and residence of aliens within the United States, *see De Canas*, 424 U.S. at 360–61, 96 S. Ct. at 939, and the breadth of these laws illustrates an overwhelmingly dominant federal interest in the field.

GLAHR, Slip Op. at 19–21 (footnote omitted).

We found support for the conclusion that the similar sections of Georgia’s immigration law were preempted by looking to the recent *Arizona* decision and *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S. Ct. 477 (1956).

Section 3 of Arizona’s Senate Bill 1070 (S.B. 1070) added a “state-law penalty for conduct proscribed by federal law”—the failure to complete and carry alien registration documents as required by 8 U.S.C. §§ 1304(e), 1306(a). *Arizona*, 132 S. Ct. at 2501. The Court explained the comprehensive nature of the current federal registration scheme, which holds aliens to certain standards of conduct and penalizes their willful failure to register with the federal government. *Id.* at 2502. Based on the breadth of federal regulation, the Court concluded that “the Federal Government has occupied the field of alien registration” and therefore found impermissible “even complementary state regulation” within that field. *Id.*; *see also id.* (“Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field . . . that has been occupied by federal law.”). The Supreme Court dismissed the state’s argument that its goal of concurrent enforcement was appropriate in a field occupied by federal regulation. *Id.* at 2502–03. Like the federal registration scheme addressed in *Arizona*, Congress has provided a

“full set of standards” to govern the unlawful transport and movement of aliens. *Id.* at 2502. The INA comprehensively addresses criminal penalties for these actions undertaken within the borders of the United States, and a state’s attempt to intrude into this area is prohibited because Congress has adopted a calibrated framework within the INA to address this issue. *See id.* at 2502–03.

... In *Nelson*, the Court held that Pennsylvania’s sedition act, which “proscribe[d] the same conduct” as the federal sedition statute, was preempted by federal law. *Id.* at 499, 76 S. Ct. at 479. As it did in *Arizona*, the Court rejected the state’s argument that its purported supplementation of federal law shielded the state statute from federal preemption. *See id.* at 504, 76 S. Ct. at 481; *see also Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604, 35 S. Ct. 715, 717 (1915) (“When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.”). The Court later discussed that the federal statute’s preemptive effect was implied because it occupied “the specific field which the States were attempting to regulate.” *De Canas*, 424 U.S. at 362, 96 S. Ct. at 940. The finding of preemption in *Nelson* was further justified because, like here, Congress had not sanctioned concurrent state legislation “on the subject covered by the challenged state law.” *Id.* at 363, 96 S. Ct. at 940.

GLAHR, Slip Op. at 21–23. Like the Georgia law at issue in *GLAHR*, we similarly conclude that Alabama is prohibited from enacting concurrent state legislation in this field of federal concern.

Furthermore, section 13 undermines the intent of Congress to confer discretion on the Executive Branch in matters concerning immigration. As we explained in *GLAHR*, “[b]y confining the prosecution of federal immigration

crimes to federal court, Congress limited the power to pursue those cases to the appropriate United States Attorney. *See* 8 U.S.C. § 1329; *Arizona*, 132 S. Ct. at 2503 (explaining that if the state provision came into force, states would have ‘the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies’). As officers of the Executive Branch, U.S. Attorneys for the most part exercise their discretion in a manner consistent with the established enforcement priorities of the Administration they serve.” *GLAHR*, Slip Op. at 24. Even though section 13 contemplates consistency with the text of 8 U.S.C. § 1324, its enforcement is noticeably “not conditioned on respect for the federal concerns or the priorities that Congress has explicitly granted executive agencies the authority to establish.” *Id.* (citing Department of Homeland Security Appropriations Act 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149 (2009), which requires the Secretary of Homeland Security to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime”). Section 13, at the very least, is in tension with federal law.

Also relevant to our finding of conflict preemption, though, are the substantive differences between the federal and state laws. Like the Georgia law

at issue in *GLAHR*, section 13 also

creates a new crime unparalleled in the federal scheme. Federal law prohibits an individual from encouraging or inducing an alien to “come to, enter, or reside *in the United States*.” 8 U.S.C. § 1324(a)(1)(A)(iv) (emphasis added). Once inside the territory, though, it is not (and has never been) a federal crime for a person to encourage an alien to migrate into another state. The Supreme Court has indicated that such additional regulation conflicts with federal law, at least when federal interest dominates. *See Hines*, 312 U.S. at 66–67, 61 S. Ct. at 404 (“[W]here the federal government, in the exercise of its superior authority in th[e immigration] field, has enacted a complete scheme of regulation . . . , states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, *or enforce additional or auxiliary regulations*.” (emphasis added)). Similarly, the criminal acts of harboring and transporting unlawfully present aliens constitute an impermissible “complement” to the INA that is inconsistent with Congress’s objective of creating a comprehensive scheme governing the movement of aliens within the United States. *See id.*

GLAHR, Slip Op. at 26–27.

Still, other provisions of section 13 are more troubling. First, the criminalization of an alien’s “conspiracy to be transported,” Ala. Code § 31-13-13(a)(3), by its text, appears to prohibit an unlawfully present alien from even agreeing to be a passenger in a vehicle. This provision cannot coexist with § 1324(a), as unlawfully present aliens who are transported “are not criminally responsible for smuggling under 8 U.S.C. § 1324.” *United States v. Hernandez-Rodriguez*, 975 F.2d 622, 626 (9th Cir. 1992). Next, the prohibition on

“harbor[ing] an alien unlawfully present in the United States by entering into a rental agreement . . . to provide accommodations,” H.B. 658, § 6, effectuates an untenable expansion of the federal harboring provision. *See, e.g., United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (construing “harboring” to encompass conduct tending to “prevent government authorities from detecting the alien’s unlawful presence”); *United States v. Myung Ho Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (same); *see also United States v. Chang Qin Zheng*, 306 F.3d 1080, 1086 (11th Cir. 2002) (finding evidence sufficient to convict of harboring where the defendant facilitated the aliens’ presence in the United States and “prevented government authorities from detecting the illegal aliens’ unlawful presence” (citing *Myung Ho Kim*, 193 F.3d at 574)); *Lozano v. City of Hazleton*, 620 F.3d 170, 223 (3d Cir. 2010) (“[W]e are not aware of any case in which someone has been convicted of ‘harboring’ merely because s/he rented an apartment to someone s/he knew (or had reason to know) was not legally in the United States.”), *vacated*, 131 S. Ct. 2958 (2011) (vacating for further consideration in light of *Chamber of Commerce of the United States v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011)). Because each of these individual provisions mandates enforcement of “additional or auxiliary regulations” that the INA does not contemplate, they are conflict

preempted.¹¹ *See Hines*, 312 U.S. at 66–67, 61 S. Ct. at 404.

5. Section 16

Section 16 prohibits employers from deducting as a business expense on their state tax filings any compensation paid to unauthorized aliens. It imposes a monetary penalty for violation of this provision equal to ten times the deduction, payable to the Alabama Department of Revenue. The district court found that the United States was likely to succeed on its preemption challenge to section 16, and we agree that it is expressly preempted by 8 U.S.C. § 1324a(h)(2).

Section 1324a, enacted in 1986 as part of IRCA, regulates the employment of aliens unauthorized to work in the United States. It expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2). Alabama does not characterize the statutory denial of a tax deduction as a licensing law but nevertheless contends that section 16 is not preempted. Therefore our task is to determine whether the statutory prohibition constitutes a “sanction” within the

¹¹ Alabama contends that, if anything, only certain offending sentences of section 13 are preempted. As we have explained, however, section 13 *in its entirety* is at odds with federal law, both as an enactment within the comprehensive scope of analogous federal provisions, *see Arizona*, 132 S. Ct. at 2502–03, and as legislation in conflict with the INA.

meaning of § 1324a(h)(2).

Alabama argues that a “sanction” should be interpreted narrowly and contends that the withholding of a tax deduction is more properly characterized as withholding a sort of reward from an employer. Neither Congress nor the Supreme Court has precisely delineated the boundaries of what constitutes a “sanction” under § 1324(a)(h)(2). In interpreting a statute, “we assume that Congress used the words in a statute as they are commonly and ordinarily understood.” *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1212 (11th Cir. 2010). A sanction is commonly understood to be “a restrictive measure used to punish a specific action or to prevent some future activity.” *Webster’s Third New International Dictionary* 2009 (1976). Notably, a sanction “may take the form of a reward which is withheld for failure to comply with the law.” *Id.* In its briefs, Alabama itself characterizes the relevant consequence as withholding of a “reward” (i.e. a tax deduction), and that description falls squarely within the common usage of the term sanction.¹² The obvious goal of section 16 is “to

¹² The Supreme Court has likewise instructed that, “[a]s a general matter, the meaning of ‘sanction’ is spacious enough to cover not only . . . punitive fines, but coercive ones as well, and use of the term carries no necessary implication that a reference to punitive fines is intended.” *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 621, 112 S. Ct. 1627, 1636 (1992). This generality applies with full force here, where Alabama seeks to coerce employers through the withholding of tax deductions and imposition of steep fines when an employer takes those deductions.

prevent some future activity” of an employer—the hiring of unauthorized workers.

We are thus persuaded that the ordinary understanding of the term sanction encompasses the section 16 prohibition on tax deductions.

The structure of § 1324a offers further support that the section 16 prohibition is preempted. Congress utilized the word “penalty” to describe civil fines in § 1324a(e)(4)(A), in contrast to use of “sanction” in subsection (h)(2). “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam)). As the Tenth Circuit stated: “Had Congress intended to preempt only those state laws that are punitive, we would have expected it to use ‘penalties’ in § 1324a(h)(2). Had it used ‘sanctions’ in § 1324a(e)(4), we might reach a similar conclusion. It did neither.” *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010).

Along those lines, by expressly exempting “licensing and similar laws” from its reach, Congress implicitly recognized that the unqualified statutory term “sanction” was broad enough to cover those types of nonpunitive measures. If

Congress had shared Alabama's narrow definition of a sanction, it would not have needed to clarify that licensing laws were permitted, since they would not be contemplated as a sanction in the first place. Because Alabama's reading would render the licensing exemption superfluous, we do not accept its definition of "sanction." *See Huff v. DeKalb Cnty.*, 516 F.3d 1273, 1280 (11th Cir. 2008) ("[C]ourts must not interpret one provision of a statute to render another provision meaningless." (quoting *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1247 (11th Cir. 2006))). The licensing exclusion and the broader structure of § 1324a thus reinforce our conclusion that Congress intended the term "sanction" to encompass more than simply monetary penalties, in accordance with its ordinary meaning.

Section 16 is functionally indistinguishable from a monetary sanction imposed on persons who employ unauthorized aliens because it denies employers an otherwise available tax deduction on account of an employee's immigration status. *See* Ala. Code § 40-18-15(a)(1) (permitting deductions for "ordinary and necessary" business expenses as determined in accordance with federal law); *see also* I.R.C. § 162(a)(1) (classifying reasonable salaries paid to employees as an ordinary and necessary business expense). Denying this deduction has the same effect on an employer as would the imposition of a direct fine. The means by which Alabama takes money from the employer is a distinction without a

difference under these circumstances, and the attempted end-run around § 1324a(h)(2)'s express preemption clause is impermissible. We therefore agree with the district court that section 16 is preempted.

6. Section 17

Section 17 declares that it is a “discriminatory practice” for an employer to either fire or fail to hire an individual authorized to work in the United States while simultaneously employing an unauthorized alien employee. Ala. Code § 31-13-17(a). It provides a civil cause of action for recovery of compensatory damages related to this “discriminatory practice” as well as court costs and attorneys’ fees for the prevailing party. *Id.* § 31-13-17(b)–(c). Section 17 also instructs that “[t]he court shall consider only the federal government’s determination when deciding whether an employee is an unauthorized alien.” *Id.* § 31-13-17(e). The district court found that, like section 16, this provision is expressly preempted by 8 U.S.C. § 1324a(h)(2). We agree.

Alabama’s civil-liability scheme acts to deter employers from hiring and retaining unauthorized aliens.¹³ Section 17 authorizes “restrictive

¹³ The private nature of the liability is irrelevant. “[O]nly an arbitrary distinction exists between sanctions initiated by government and those initiated by private individuals. Civil liability necessarily bears the sanction of government.” 1A *Sutherland Statutory Construction* § 20:19 (7th ed. 2009).

measures”—compensatory damages, mandatory attorneys’ fees, and mandatory court costs—to punish a “specific action”—hiring or retaining an unauthorized employee. It therefore fits well within the ordinary understanding of a sanction. Although section 17 conditions liability on a prerequisite act—firing or refusing to hire an authorized worker—that requirement does not obviate a finding that this section functions as a sanction. Section 17 at its core is clearly intended to punish the employment of unauthorized aliens, and adding a conjunctive condition that targets specific circumstances under which this behavior will be punished does not change its essence as a sanction.

Our conclusion is in accord with the Tenth Circuit’s finding that § 1324a expressly preempted a similar state compensatory statute. *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010). In *Edmondson*, the Tenth Circuit was faced with an Oklahoma law subjecting employers to “cease and desist orders, reinstatement, back pay, costs, and attorneys’ fees” if they terminated a legal worker while retaining an unauthorized alien employee. 594 F.3d at 765. In addition to looking at the common understanding of the term “sanction,” the Tenth Circuit found instructive the use of that term in other provisions of federal law. *See id.* at 765–66. The court noted that “sanctions” in the Federal Rules of Civil Procedure included in their scope reasonable attorneys’ fees, costs, and other

expenses. *Id.* at 766 (citing Fed. R. Civ. P. 11(c)(4), 37(d)(3)). Like section 17, the Oklahoma statute included precisely those punishments described as sanctions in other parts of federal law, which offered further justification that it was expressly preempted by § 1324a.

Alabama analogizes three cases to illustrate that section 17's "compensatory remedies" cannot qualify as § 1324a sanctions. In none of those cases, however, is an employer required to pay on account of his having hired or retained an unauthorized alien; the cause of action in each case was based on another statute wholly removed from any contingency of employing an unauthorized alien. Alabama first relies on *Madeira v. Affordable Housing Foundation, Inc.*, in which the Second Circuit held that § 1324a did not expressly preempt a state workers' compensation law that levied damages against an employer who refused to pay an unauthorized worker who was injured on the job. 469 F.3d 219, 239–40 (2d Cir. 2006). There, the employer's liability was totally unrelated to the work authorization of any employee involved. Alabama also cites to *Jie v. Liang Tai Knitwear Co.* for the proposition that "a statutory reference to sanctions does not equal a reference to damages." 107 Cal. Rptr. 2d 682, 690 n.7 (Cal. Ct. App. 2001). As in *Madeira*, the cause of action in *Jie* was retaliatory termination—an

action not in any way based on the work authorization of an employee.¹⁴ Finally, Alabama points to an equally inapposite case, *Mendoza v. Zirkle Fruit Co.*, which held that the plaintiffs had stated a state claim for civil conspiracy based on the employer's alleged hiring of unauthorized workers in order to depress wages. No. 00-3024, 2000 WL 33225470, at *11 (E.D. Wash. Sept. 27, 2000), *rev'd on other grounds*, 301 F.3d 1163 (9th Cir. 2002). Yet again, the state cause of action was not dependent on whether the underlying acts involved unauthorized workers. These cases are all dissimilar from the section 17 cause of action in which liability is invariably contingent on the hiring and retention of an unauthorized worker. We are thus persuaded that the Tenth Circuit's reasoning in *Edmondson* is a much closer analogy than any of the cases cited by Alabama, and we find that section 17 is expressly preempted by § 1324a(h)(2).

7. Section 18

Section 18, as amended, imposes a requirement to investigate, through inquiry under 8 U.S.C. § 1373(c), whether individuals found to be in violation of Ala. Code § 32-6-1 or § 32-6-9 are permissibly within the United States. Neither

¹⁴ It does not appear that the *Jie* court even seriously considered an express preemption argument as related to § 1324a. The court's reasoning centered around conflict preemption, *see* 107 Cal. Rptr. 2d at 589 ("[T]here is no conflict between IRCA and the California law that allows employees to sue for wrongful termination . . ."), and the absence of any provision of IRCA that expressed preemptive intent for federal law to trump "long-standing state law that allows a private cause of action for wrongful termination," *id.* at 690.

the district court nor this court enjoined enforcement of section 18 prior to the H.B. 658 amendment. In light of *Arizona*, we find at this time that the United States is not likely to succeed in its preenforcement challenge to section 18.¹⁵

We have already determined with respect to section 12(a) that Alabama officers may inquire into the immigration status of individuals lawfully detained. This conclusion is consistent with the Supreme Court's rejection of a similar challenge in *Arizona*. 132 S. Ct. at 2507–10. Section 18 specifies that an immigration-status inquiry must be performed for any individual found in violation of Ala. Code §§ 32-6-1 or 32-6-9—provisions concerning driving without a valid license—regardless of whether the officer has reasonable suspicion to believe that the individual is unlawfully present. *Cf.* Ala. Code § 31-13-12(a) (requiring reasonable suspicion of unlawful presence in order to engage in the § 1373(c) inquiry). We believe the absence of a reasonable suspicion element is irrelevant in light of the federal-state communication contemplated by 8 U.S.C. § 1373(c), which is not contingent on a state officer's belief of the inquired-about individual's immigration status. *See Arizona*, 132 S. Ct. at 2508 (“Congress has

¹⁵ The challenge to section 18 is not moot. The arguments in the district court, and those made prior to the *Arizona* ruling, hinged on whether the state had the authority to mandate this type of immigration inquiry. The removal of the requirement that an arrestee be taken to a magistrate does nothing to moot the challenge, nor does the clarification of the extent of detention authorized by section 18 “render the original controversy a mere abstraction.” *Naturist Soc’y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992).

made clear that no formal agreement or special training needs to be in place for state officers to ‘communicate with the [Federal Government] regarding the immigration status of *any* individual’” (emphasis added) (quoting 8 U.S.C. § 1357(g)(10)(A))).

Furthermore, we must give the state an opportunity to clarify the extent to which detentions are permissible under section 18. *See id.* at 2509–10. Although this provision could be construed to allow a detention, we do not rule out the possibility that it could be interpreted differently. The state could, for example, determine that section 18 does not authorize detention or that a detention must be limited in certain ways. In sum, *Arizona* instructs us that a preenforcement challenge to the possibility of detention under section 18 is inappropriate, and we therefore reject the preemption arguments at this time.

8. Section 27

Section 27 prohibits Alabama courts from enforcing or recognizing contracts between a party and an unlawfully present alien, provided the party knew or constructively knew that the alien was in the United States unlawfully. Ala. Code § 31-13-26(a).¹⁶ Certain contracts are permissible, though, and those

¹⁶ We agree with the parties that the minor alterations to section 27 effectuated by H.B. 658 do not moot this case. H.B. 658 clarified that the provision did not apply to “a contract entered into prior to [its] effective date” or to “a contract for the appointment or retention of legal

exceptions help illustrate Alabama's end goal in enacting section 27: forcing undocumented individuals out of Alabama. A contract is permissible if, for example, it can reasonably be completed within 24 hours of formation. *Id.* Additionally, contracts are permitted to provide for overnight lodging, food, medical services, or transportation "that is intended to facilitate the alien's return to his or her country of origin." *Id.* § 31-13-26(b). In light of these narrow exceptions to section 27, undocumented aliens will be practically prohibited from enforcing contracts for basic necessities.¹⁷ To say that section 27 is extraordinary and unprecedented would be an understatement, as it imposes a statutory disability typically reserved for those who are so incapable as to render their contracts void or voidable. Essentially, the ability to maintain even a minimal existence is no longer an option for unlawfully present aliens in Alabama.

The power to expel aliens has long been recognized as an exclusively federal power. *See Fok Yung Yo v. United States*, 185 U.S. 296, 302, 22 S. Ct. 686, 688 (1902); *Fong Yue Ting v. United States*, 149 U.S. 698, 706-07, 13 S. Ct.

counsel in legal matters." H.B. 658, § 1. These changes have neither removed the "challenged features" of the prior law nor altered the fundamental argument of the United States, so we find the controversy is not moot. *Fillyaw*, 958 F.2d at 1520.

¹⁷ Although an unlawfully present alien could technically enter into a contract, the other party could withdraw from it with impunity, taking the proceeds and leaving the alien with no recourse.

1016, 1019 (1893). The power to exclude and the related federal power to grant an alien permission to remain “exist as inherently inseparable from the conception of nationality.” *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318, 57 S. Ct. 216, 220 (1936). This is so because the federal government “is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties,” which includes the field of immigration. *Hines v. Davidowitz*, 312 U.S. 52, 62–63, 61 S. Ct. 399, 402 (1941); *see also Arizona*, 132 S. Ct. at 2506–07; *Chy Lung v. Freeman*, 92 U.S. 275, 279–80 (1876). In light of these principles, a state’s decision to impose “distinct, unusual and extraordinary burdens and obligations upon aliens” may constitute an impermissible intrusion into the federal domain. *Hines*, 312 U.S. at 65–66, 61 S. Ct. at 403. We believe that the blanket prohibition of the right to enforce nearly any contract easily qualifies as an extraordinary burden.

The ability to contract is not merely an act of legislative grace; it is a capability that, in practical application, is essential for an individual to live and conduct daily affairs. The importance of contracts in the United States is reaffirmed by the Constitution, federal statute, and the Supreme Court. *See* U.S. Const. art. I, § 10, cl. 1; 42 U.S.C. § 1981(a); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432, 88 S. Ct. 2186, 2199 (1968) (recognizing the right “to make

contracts” as one of the “great fundamental rights”). Consistent with this general recognition, the Alabama legislature and courts have crafted limitations on the essential right to contract only in circumstances where the contracting individual is presumptively incapable of conducting their own affairs.¹⁸ *See, e.g., S.B. v. St. James Sch.*, 959 So. 2d 72, 96 (Ala. 2006) (explaining that minors under the age of nineteen are generally incapable of contracting under Alabama law); *Lloyd v. Jordan*, 544 So. 2d 957, 959 (Ala. 1989) (discussing the lack of contractual capacity of the mentally ill); *Williamson v. Matthews*, 379 So. 2d 1245, 1247–48 (Ala. 1980) (explaining that an individual’s intoxication renders a contract voidable); *see also* Ala. Code § 26-1-1 (defining the age of majority under state law); *id.* § 26-13-1 *et seq.* (prescribing procedures to relieve minors from the disabilities of nonage).

As previously stated, section 27 excepts from its scope contracts for (1) “lodging for one night,” (2) food, (3) medical services, and (4) transportation intended to “facilitate the alien’s return to his or her country of origin.” Ala. Code § 31-13-26(b). Considering this provision, which imposes “distinct, unusual and

¹⁸ *See also* Restatement 2d of Contracts § 13 cmt. a (justifying the lack of contractual capacity of persons under guardianship); *id.* § 15 cmt. a (offering the rationale that a person suffering mental disease incurs voidable contractual duties based on “protection of persons unable to protect themselves”).

extraordinary burdens,” *Hines*, 312 U.S. at 65, 61 S. Ct. at 403, in conjunction with the sections that require maximum and mandatory enforcement, *see* Ala. Code §§ 31-13-5, -6, we are convinced that Alabama has crafted a calculated policy of expulsion, seeking to make the lives of unlawfully present aliens so difficult as to force them to retreat from the state. *See also* Ala. Code § 31-13-23 (requiring a periodic report on “the progress being made in the effort to reduce the number of illegal aliens in the State of Alabama”). Because this power is retained only by the federal government, section 27 is preempted by the inherent power of the federal government to regulate immigration. *See De Canas*, 424 U.S. at 354, 96 S. Ct. at 936 (“Power to regulate immigration is unquestionably *exclusively* a federal power.” (emphasis added)).¹⁹

It is also clear to us that the expulsion power Alabama seeks to exercise through section 27 conflicts with Congress’s comprehensive statutory framework governing alien removal. Congress has specified the numerous categories of aliens who are subject to removal, 8 U.S.C. § 1227, and identified the particular classes subject to expedited proceedings, *id.* § 1228. Congress further provided

¹⁹ Our conclusion is fully consistent with *De Canas*, where the Supreme Court ruled that a California employment statute was not an unconstitutional regulation of immigration. 424 U.S. at 355–56, 96 S. Ct. at 936. As stated above, section 27 has much more than a “purely speculative and indirect impact on immigration” and, therefore, is not comparable to the statute at issue in *De Canas*. *Id.* at 355, 96 S. Ct. at 936.

that the determination of removability typically must be made by an immigration judge consistent with the procedures set forth in the INA. *Id.* § 1229a(a)–(b).

Various statutes govern the relief available to aliens otherwise subject to removal—that is, those aliens who are in the country unlawfully but permitted to remain, whether permanently or temporarily. *See, e.g.*, 8 U.S.C. § 1158 (governing an alien’s application for asylum); *id.* § 1229b (regulating cancellation of removal and adjustment of the alien’s unlawful status); *id.* § 1229c (prescribing the conditions of voluntary departure); *id.* § 1231(b)(3) (governing withholding of removal); *see also* 8 C.F.R. § 208.16(c) (controlling claims under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). By enacting section 27, Alabama has essentially decided that unlawfully present aliens cannot be tolerated within its territory, without regard for any of the statutory processes or avenues for granting an alien permission to remain lawfully within the country.

It is also obvious from the statutory scheme that Congress intends the Executive Branch to retain discretion over expulsion decisions and applications for relief.²⁰ *See Holder v. Martinez Gutierrez*, 566 U.S. ___, 132 S. Ct. 2011,

²⁰ Control over the expulsion of aliens has long been recognized as “a power affecting international relations,” *Fong Yue Ting*, 149 U.S. at 713, 13 S. Ct. at 1022, thus bringing it within the province of the Executive, *see Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414, 123 S.

2015 (2012) (“The immigration laws have long given the Attorney General discretion to permit certain otherwise-removable aliens to remain in the United States.”). This discretion is perhaps best illustrated by Congress’s decision to vest exclusive power in the Attorney General to “commence proceedings, adjudicate cases, or execute removal orders against any alien.” 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–85, 119 S. Ct. 936, 943–44 (1999) (discussing the administrative discretion codified in § 1252(g)). Similarly, Congress contemplated that officers of the Executive Branch would exercise their judgment on the subject of granting temporary or permanent relief from removal. *See* 8 U.S.C. § 1158(b)(1)(A) (permitting the Attorney General or Secretary of Homeland Security to grant asylum); *id.* § 1229b(a), (b) (permitting the Attorney General to cancel removal proceedings and to adjust an alien’s immigration status); *id.* § 1229c(a), (b) (authorizing the Attorney General to permit an alien’s voluntary departure); *id.* § 1231(b)(3) (prohibiting removal if the Attorney General determines the alien’s life or freedom would be threatened on any of the specified grounds). And along with this discretion, Congress sharply

Ct. 2374, 2386 (2003). *See also Arizona*, 132 S. Ct. at 2498; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89, 72 S. Ct. 512, 519 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . .”).

limited judicial review of the immigration-related adjudications. *See id.*

§ 1252(a)(2), (b)(4). These statutes point to one conclusion: Congress intended that the Executive Branch determine who must be removed and who may permissibly remain. Through section 27, Alabama has taken it upon itself to unilaterally determine that any alien unlawfully present in the United States cannot live within the state's territory, regardless of whether the Executive Branch would exercise its discretion to permit the alien's presence. This is not a decision for Alabama to make,²¹ and we find that section 27 conflicts with federal law.

Alabama argues that section 27 is shielded from preemption because it legislates in the field of contract law, which is typically within the province of the states and therefore entitled to the presumption against preemption. While it is true that contract is a matter of traditional state concern, that does not resolve the preemption inquiry. Indeed, the Supreme Court's decision in *Crosby v. National Foreign Trade Council* refutes Alabama's position. 530 U.S. 363, 120 S. Ct. 2288 (2000). In *Crosby*, Massachusetts enacted a law to restrict the ability of state agencies to buy goods and services from companies that conducted business with Burma. *Id.* at 367, 120 S. Ct. at 2291. Congress, however, enacted a statute

²¹ If every other state enacted similar legislation to overburden the lives of aliens, the immigration scheme would be turned on its head. The federal government—not the fifty states working in concert—retains the power to exclude aliens from the country.

imposing mandatory and conditional sanctions on Burma just three months after the Massachusetts law was enacted. *Id.* at 368, 120 S. Ct. at 2291. The intended result of the state statute—like its federal counterpart—was economic pressure on the Burmese government, and the state sought to achieve its goal through the state’s own purchasing power. The Court concluded that, even if a presumption against preemption applied, the Massachusetts statute regulating the state’s own business transactions would not escape preemption. *Id.* at 374 n.8, 120 S. Ct. at 2294. Similar to the situation at hand, Congress had promulgated federal law to ensure that the Executive had “flexible and effective authority” over the economic sanctions, which contributed to the finding of preemption. *See id.* at 374, 120 S. Ct. at 2295.

The Supreme Court has also instructed that a preemption analysis must contemplate the practical result of the state law, not just the means that a state utilizes to accomplish the goal. In *Buckman Co. v. Plaintiffs’ Legal Committee*, the Supreme Court found that a state tort cause of action—an area of traditional state concern—was preempted by federal law where the underlying allegations concerned fraud against a federal agency. 531 U.S. 341, 347, 121 S. Ct. 1012, 1017 (2001) (“Policing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied’” (quoting *Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947))). The concern was stated more explicitly in *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.*, where the Court considered a state statute that regulated the state's own purchase of goods and services. 475 U.S. 282, 283–84, 106 S. Ct. 1057, 1059–60 (1986). “[T]he point of the [state] statute,” the Court explained, was “to deter labor law violations.” *Id.* at 287, 106 S. Ct. 1061–62; *see also id.* (observing that “[n]o other purpose could credibly be ascribed” to the state law). Thus, even though the state purported to govern in an area of traditional state concern, it could not “enforce the requirements” of federal regulations through its own statutory scheme. *Id.* at 291, 106 S. Ct. at 1064. Stated another way, “[t]he fact that the State ‘had chosen to use its spending power rather than its police power’” did not remedy the conflict between the federal and state statutes. *Crosby*, 530 U.S. at 373 n.7, 120 S. Ct. at 2294 (quoting *Gould*, 475 U.S. at 289, 106 S. Ct. at 1062).

Like the state statutes in *Crosby*, *Buckman*, and *Gould*, the thrust of section 27 is to impinge on an area of core federal concern. It constitutes a thinly veiled attempt to regulate immigration under the guise of contract law, and thus, we do not think the presumption against preemption applies. *See Buckman*, 531 U.S. at 347–48, 121 S. Ct. at 1017. Even if it does, we conclude that it is preempted. *See*

Crosby, 530 U.S. at 374 n.8, 120 S. Ct. at 2294.²²

9. Section 28

Section 28 requires Alabama's public elementary and secondary schools to request certain documentation from enrolling children in order to classify them as either lawfully or unlawfully present within the United States. Ala. Code § 31-13-27(a). The United States contends, as it did in the district court, that section 28 is preempted by 8 U.S.C. § 1643(a)(2), which provides that no federal law "may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*." The district court did not preliminarily enjoin section 28, but this court did enjoin its enforcement pending appeal.

We have found in the private plaintiffs' companion case, No. 11-14535, that section 28 violates the Equal Protection Clause as interpreted in *Plyler*. Thus, it is unnecessary to address the United States's argument that it is also preempted by federal law, though we recognize that the statutory reference to *Plyler* means that the inquiries necessarily overlap. Because we reverse the district court's disposition of this claim in the private plaintiffs' case, we dismiss the United

²² Alabama suggests in its supplemental brief that section 27 could be saved by severing the "constructive knowledge" element of the provision. We do not think that the purpose or the effect of the statute would be materially altered by that.

States's appeal as moot.

10. Section 30

As originally enacted, section 30 provided that an unlawfully present alien “shall not enter into or attempt to enter into a business transaction with the state or a political subdivision” thereof. Alabama contended that this language covered only transactions to obtain licenses, and the district court adopted that reading of the law in making its decision. *See United States v. Alabama*, 813 F. Supp. 2d at 1350–51. Since oral argument in this appeal, the Alabama legislature amended section 30 to clarify that it is a criminal act for an unlawfully present alien to enter into certain “public records transaction[s].” H.B. 658, § 1.²³ This phrase is defined as applying for or renewing “a motor vehicle license plate,” “a driver’s license or nondriver identification card,” “a business license,” “a commercial license,” or “a professional license.” *Id.* Section 30, as amended, clarifies that it does not reach applications for a marriage license, transactions related to housing or property ownership, payment of property or other taxes, or “any other transaction.” *Id.* Thus, by the terms of the newly enacted section 30, the state legislature has clarified that the criminal prohibitions apply only to six select

²³ It is also unlawful for any individual to enter or attempt to enter into any of these transactions on behalf of an unlawfully present alien. Ala. Code § 31-13-29(b).

categories of state-issued licenses: vehicle license plates, driver's licenses, identification cards, business licenses, commercial licenses, and professional licenses. An individual who engages in the proscribed behavior commits a Class C felony, Ala. Code § 31-13-29(d), which is punishable by a term of imprisonment of between one and ten years, *id.* § 13A-5-6(a)(3), and a possible additional fine of up to \$15,000, *see id.* § 13A-5-11(a)(3); *see also id.* § 13A-5-2(a)–(b).²⁴

First, we dismiss any argument that the particular licensing restrictions housed in subsection (a) are facially preempted by federal law. Through the REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B), 119 Stat. 231, 313 (codified as note to 49 U.S.C. § 30301), Congress encouraged individual states to require evidence of lawful status as a prerequisite to issuing a driver's license or identification card to an applicant. Given that the states may thus permissibly withhold these instruments from unlawfully present aliens, it follows that it is perfectly legitimate for Alabama to withhold a motor vehicle license plate from an

²⁴ We conclude that the challenge to section 30 is not moot. Section 30(d), the subsection that imposes criminal penalties, has been amended only to clarify that it applies to unlawfully present aliens or those who act on their behalf, as stated in subsection (b). We understand this criminalization to be the main thrust of the United States's challenge, and H.B. 658 has not removed this "objectionable feature[]" of the prior law." *Fillyaw*, 958 F.2d at 1520. Moreover, H.B. 658 aligned the text of section 30(a) with the interpretation that Alabama adopted in briefing and that the district court applied in its ruling. Because the United States consistently argued that the former section 30 was preempted even if limited to business transactions, the controversy here remains live.

individual who cannot lawfully operate the vehicle.

The withholding of business, commercial, and professional licenses is likewise permissible. Pursuant to Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“Welfare Reform Act”), Pub. L. No. 104-193, 110 Stat. 2105, Congress deemed some unlawfully present aliens ineligible for certain state and local public benefits unless the state explicitly provides otherwise. *See* 8 U.S.C. § 1621. The benefits for which such aliens are ineligible include any “professional license[] or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government.” *Id.* § 1621(c)(1)(A). Congress’s definition of the relevant benefits appears to us entirely consistent with the licenses that Alabama withholds through section 30. As Congress has either expressly or implicitly approved of the state’s withholding of a license in each of the six categories within the purview of section 30, the state’s restriction is not facially preempted.

The United States observes that there may be an incongruence between the two federal statutes and Alabama’s licensing restrictions, insofar as the latter may be applied to certain aliens who may in fact be eligible for the licenses under federal law. This argument has some force. Indeed, the key phrase in section 30(b)—“alien not lawfully present in the United States”—could be construed in a

way that it would be in tension with the REAL ID Act, *see, e.g.*, Pub. L. No. 109-13, § 202(c)(2)(B)(vi), 119 Stat. at 313 (contemplating that an alien who “has a pending application for asylum” can obtain a driver’s license), and the Welfare Reform Act, *see, e.g.*, 8 U.S.C. §§ 1621, 1641(b)(5) (providing that “an alien whose deportation is being withheld” is a “qualified alien” eligible for state benefits). But section 30 could be construed to avoid this problem, and if this issue does arise, it may be more appropriately addressed in the context of an as-applied challenge.

The question then is whether section 30 can be upheld insofar as subsection (d) creates a new state felony for application or attempted application for the requested licenses. The United States emphasizes the complete absence of federal criminal penalties attached to licensing applications. The United States posits that the felony criminal penalty associated with attempts to apply for state licenses are inconsistent with the federal scheme because the only result contemplated under federal law is denial of the requested license.²⁵ Although there is some pull to this

²⁵ The United States also suggests that section 30, both as originally enacted and as amended, effectively criminalizes “an alien’s unlawful presence in Alabama.” Supplemental Brief of the United States at 13. We have difficulty seeing this to be the case. We agree with the United States that section 30, as originally enacted, had the purpose and effect of driving unlawfully present aliens out of the state. It criminalized any attempt by such aliens to enter into “any transaction between a person and the state or a political subdivision,” with the exception of applications for marriage licenses. Ala. Code § 31-13-29(a) (emphasis added), *amended by* H.B. 658, § 1. Thus, it clearly contemplated that these aliens would be deprived of basic needs, such

argument, at this point we do not find it entirely persuasive.

The United States identifies the REAL ID Act and the Welfare Reform Act as the sources of federal preemption. But our examination of these statutes does not leave us with the impression that subsection (d) would be inconsistent with federal objectives. As relevant here, the REAL ID Act provides that the federal government will not accept a state-issued driver's license or identification card unless the state verified the citizenship or immigration status of the applicant before issuing the document. *See* Pub. L. No. 109-13, § 202(c)(2)(B), 119 Stat. at 313. Notably, this measure does not prohibit states from issuing driver's licenses or identification cards to unlawfully present aliens. Nor does it even require that states verify the citizenship or immigration status of those who apply for such documents. Rather, it provides an incentive—albeit a strong one—for states to institute such a verification scheme.

The REAL ID Act thus does not purport to comprehensively regulate

as water, garbage, and sewer services. It thus amounted to an impermissible policy of expulsion.

As amended, however, section 30 criminalizes only the attempt to obtain vehicle license plates and various licenses. The scope of section 30, as amended, is thus considerably smaller, and we do not think that it has the effect of making it impossible for unlawfully present aliens to live in Alabama or otherwise criminalizing their presence. This is especially so because the state may withhold these benefits, consistent with the REAL ID Act and the Welfare Reform Act. Section 30 only operates to proscribe conduct in which unlawfully present aliens are unlikely to engage, given that, through H.B. 56 and prior legislation, Alabama has chosen not to make them eligible for these specific benefits in the first place. *See also* Ala. Admin. Code r. 760-X-1-.20 (requiring driver's license applicants to submit proof of authorized presence).

driver's licenses, identification cards, and unlawfully present aliens. Rather, it leaves the field essentially open, giving room for the states to adopt different policies concerning this subject. See H.R. Rep. No. 109-72, at 177 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 302 (noting that the REAL ID Act “does not directly impose federal standards” and that “states need not comply with the listed standards”). Given the limited scope of the REAL ID Act, we do not see how it forecloses Alabama's decision to make it a crime for an unlawfully present alien to attempt to get a driver's license or identification card once it has decided that such aliens are ineligible for these documents.

The idea that the Welfare Reform Act preempts section 30(d), insofar as it concerns business, commercial, and professional licenses, rests on more solid ground. That legislation sought to establish a “national policy with respect to welfare and immigration,” one that Congress enacted in an attempt to “remove the incentive for illegal immigration provided by the availability of public benefits.” 8 U.S.C. § 1601. Thus, the Welfare Reform Act is similar to IRCA in that it represents a concerted effort on the part of Congress to address the flow of illegal immigration across the nation's borders. See *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (“Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented

aliens.”).

But the Welfare Reform Act is different from IRCA in a crucial respect. IRCA is a “comprehensive scheme,” *Hoffman Plastic Compounds*, 535 U.S. at 147, 122 S. Ct. at 1282, that embodies a “careful balance struck by Congress,” *Arizona*, 132 S. Ct. at 2505. Specifically, IRCA’s lengthy legislative history shows “that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.” *Id.* at 2504. The legislative record reflects “a considered judgment that [such penalties] would be inconsistent with federal policy and objectives.” *Id.* For this reason, even though the text of IRCA itself does not prohibit states from imposing sanctions on unauthorized aliens who engage in work, the individual states are not free to do so. *See id.* at 2504–05.

The same conclusion does not seem to obtain under the Welfare Reform Act. It is true that the statute is singularly focused on the withholding of licenses, and it does not provide for criminal sanctions. *See* 8 U.S.C. § 1621.²⁶ But the

²⁶ The Welfare Reform Act also seems to be of a different character than IRCA in that it does not purport to offer a definitive approach to the problem that Congress perceived. Indeed, although Congress made the determination that unlawfully present aliens generally should not be eligible for licenses, *see* 8 U.S.C. § 1621(a), it also contemplated that states could opt out of that rule, *see id.* § 1621(d); *see also id.* § 1601(7) (recognizing that states can choose not to “follow the Federal classification”). Thus, far from occupying the field, Congress accepted that states would adopt different policies on licenses and unlawfully present aliens.

statute also does not expressly rule out such penalties, and the United States has not cited any legislative history, similar to that of IRCA, that would reflect “a considered judgment” on the part of Congress “that [such penalties] would be inconsistent with federal policy and objectives.” *Arizona*, 132 S. Ct. at 2504. In the absence of such a showing, it is not evident that a measure like subsection (d) would detract from Congress’s policy objectives and thus be impliedly preempted.

Of course, this is not to say that subsection (d) is, without a doubt, in harmony with the existing congressional design. Alabama has decided to make an attempt to seek a license an offense that is punishable by up to ten years imprisonment, *see* Ala. Code § 13A-5-6(a)(3), and a possible additional fine of up to \$15,000, *see id.* § 13A-5-11(a)(3); *see also id.* § 13A-5-2(a)–(b).²⁷ Congress may very well have thought that this kind of penalty is inappropriate. *Cf.* H.R. Rep. No. 99-682, pt. I, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 (discussing in the context of IRCA that employer, rather than employee, sanctions are “the most humane, credible and effective way” of responding to the influx of undocumented aliens). But the United States has not drawn our attention to any legislative history to demonstrate this. As a result, for now, there is only “a

²⁷ We observe again that section 30 only criminalizes conduct that appears highly unlikely to occur, given that Alabama has chosen not to make these specific benefits available in the first place.

hypothetical or potential conflict,” which is insufficient to establish preemption.

Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S. Ct. 3294, 3299 (1982).

In sum, we conclude that the restrictions on licenses, as clarified by recent amendment, are not facially in tension with the federal immigration scheme. We also hold that at this stage, the United States has not shown that the criminal provisions located in section 30(d) are preempted by federal law.

B. Equitable Factors

The equities weigh in favor of enjoining those provisions that are preempted by federal law. The United States suffers injury when its valid laws in a domain of federal authority are undermined by impermissible state regulations. Frustration of federal statutes and prerogatives are not in the public interest, and we discern no harm from the state’s nonenforcement of invalid legislation. For these reasons, and the numerous reasons detailed above that require federal law to prevail, the equities favor enjoining enforcement of sections 10, 11(a), 13(a), 16, 17 and 27.

III. Conclusion

Just like Arizona, Alabama has “understandable frustrations with the problems caused by illegal immigration.” *Arizona*, 132 S. Ct. at 2510. Although it is a problem that gives rise to unique issues in our Nation, we must be mindful that individual states “may not pursue policies that undermine federal law.” *Id.*

We find that the United States is likely to succeed on the merits of its challenge to sections 10, 11(a), 13(a), 16, 17, and 27. Consistent with its position set forth in supplemental briefing, we agree with the United States that it is not likely to succeed on the merits of its challenge to section 12(a) or section 18 at this time. We also find that the United States has not shown at this stage that it is likely to succeed on the merits of its challenge to section 30. Finally, we dismiss the United States's appeal as to section 28 as moot, as our opinion in the private plaintiffs' companion case fully disposes of that issue.²⁸

**AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART,
AND REMANDED.**

²⁸ In light of our disposition, Alabama's motion to partially vacate the injunction is granted. A separate order shall issue.

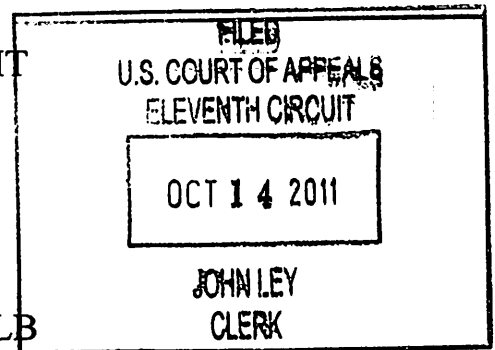
Exhibit B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-14532-CC

D.C. Docket No. 2:11-cv-2746-SLB



UNITED STATES OF AMERICA,

Plaintiff-Appellant,
Cross Appellee,

versus

STATE OF ALABAMA,
GOVERNOR OF ALABAMA,

Defendants-Appellees,
Cross Appellants,

NATIONAL FAIR HOUSING ALLIANCE, INC.,
AMERICAN UNITY LEGAL DEFENSE FUND,

Defendants-Appellees.

No. 11-14535-CC

D.C. Docket No. 5:11-cv-2484-SLB

HISPANIC INTEREST COALITION OF ALABAMA,
AIDS ACTION COALITION, et al.,

Plaintiffs-Appellants,
Cross Appellees,

versus

GOVERNOR OF ALABAMA,

ATTORNEY GENERAL, STATE OF ALABAMA, et al.,

Defendants-Appellees,
Cross Appellants,

SUPERINTENDENT OF HUNTSVILLE CITY SCHOOL SYSTEM, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

Before CARNES, BARKETT, and HULL, Circuit Judges.

ORDER BY THE COURT:

These two appeals involve the United States' and various plaintiffs'¹ (the "private plaintiffs") challenges to the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Ala. Laws Act 2011-535 ("H.B. 56"). In the district court,

¹The plaintiffs in the second appeal are: (1) Hispanic Interest Coalition of Alabama; (2) AIDS Action Coalition; (3) Huntsville International Help Center; (4) Interpreters and Translators Association of Alabama; (5) Alabama Appleseed Center for Law & Justice, Inc.; (6) Service Employees International Union; (7) Southern Regional Joint Board of Workers United; (8) United Food and Commercial Workers International Union; (9) United Food and Commercial Workers Union Local 1657; (10) DreamActivist.org; (11) Greater Birmingham Ministries; (12) Boat People SOS; (13) Matt Webster; (14) Maria D. Ceja Zamora; (15) Pamela Long; (16) Juan Pablo Black Romero; (17) Christopher Barton Thau; (18) Ellin Jimmerson; (19) Robert Barber; (20) Daniel Upton; (21) Jeffrey Allen Beck; (22) Michelle Cummings; (23) Esayas Haile; (24) Fiseha Tesfamariam; (25) Jane Doe #1; (26) Jane Doe #2; (27) Jane Doe #3; (28) Jane Doe #4; (29) Jane Doe #5; (30) Jane Doe #6; (31) John Doe #1, a minor, by his legal guardian Matt Webster; (32) John Doe #2; (33) John Doe #3; (34) John Doe #4; (35) John Doe #5; and (36) John Doe #6.

the United States and the private plaintiffs filed motions for a preliminary injunction as to various sections of H.B. 56. After a hearing, the district court granted the motions as to numerous sections of H.B. 56 but denied them as to other sections. Pursuant to Rules 8(a) and 27 of the Federal Rules of Appellate Procedure, the United States and the private plaintiffs move this Court to enjoin pending appeal Alabama's enforcement of six of the sections of H.B. 56 not enjoined by the district court. After review and briefing, we grant in part and deny in part the motions for injunctions pending appeal.

I. PROCEDURAL BACKGROUND

On June 2, 2011, the Alabama Legislature approved H.B. 56, and Governor Robert Bentley signed H.B. 56 into law on June 9, 2011. The majority of the provisions in H.B. 56 were set to become effective on September 1, 2011.

A. United States' Lawsuit

Seeking to permanently enjoin enforcement of certain provisions of H.B. 56, the United States sued the State of Alabama, Governor Robert J. Bentley in his official capacity, the National Fair Housing Alliance, Inc., and the American Unity Legal Defense Fund. The United States argued, *inter alia*, that Sections 10, 11(a), 12, 13, 16, 17, 18, 27, 28, and 30 of H.B. 56 were preempted under the Supremacy Clause and by federal law, principally the comprehensive registration scheme

embodied in the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, et seq.

The contents of the sections challenged by the United States are summarized as follows:

Section 10 creates a criminal misdemeanor violation under Alabama law for “willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a),² and the person is an alien unlawfully present in the United States.” Section 10(b) prohibits law enforcement officers from attempting to independently make a final determination of whether an alien is lawfully present in the United States and requires law enforcement to determine immigration status by seeking verification from the federal government under 8 U.S.C. § 1373(c).³

Section 11(a) makes it a misdemeanor crime for an unauthorized alien to apply for, solicit, or perform work.

Section 12 requires a law enforcement officer—upon making “any lawful stop, detention, or arrest” in the enforcement of state or local law and upon reasonable suspicion that person stopped, detained, or arrested is unlawfully present in the United States—to make a reasonable attempt, “when practicable,” to determine the citizenship and

²Pursuant to § 1304(e), every alien eighteen years of age and older must carry a certificate of alien registration or alien registration receipt card; failure to carry the registration card is a misdemeanor punishable by a fine not exceeding \$100, imprisonment of no more than 30 days, or both. 8 U.S.C. § 1304(e). Section 1306(a) states that an alien’s willful failure to apply for registration and to be fingerprinted is a misdemeanor punishable by a fine not exceeding \$1,000, imprisonment of no longer than six months, or both. 8 U.S.C. § 1306(a).

³Pursuant to § 1373(c), “The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.” 8 U.S.C. § 1373(c).

immigration status of the person stopped, detained, or arrested, except if the determination may hinder or obstruct an investigation. A person is presumed not to be an alien who is unlawfully present if the alien presents a valid driver's license, a valid Alabama nondriver identification card, an unexpired, government-issued identification bearing a photograph or other biometric identifier, a tribal identification card, or a foreign passport with an unexpired visa. A law enforcement officer may not consider race, color, or national origin in implementing this section. Section 12(b) requires law enforcement, within 24 hours of arresting an alien, to verify with the federal government the immigration status of the arrestee. If the federal verification "is delayed beyond the time that the alien would otherwise be released from custody, the alien shall be released from custody."

Section 13 makes it unlawful for a person to (1) conceal, harbor, or shield an alien unlawfully present in the United States, or attempt or conspire to do so; (2) encourage an unlawful alien to come to the State of Alabama; or (3) transport (or attempt or conspire to transport) an unlawful alien.

Section 16 forbids employers from claiming as business tax deductions any wages paid to an unauthorized alien.

Section 17 establishes a civil cause of action against an employer who fails to hire or discharges a U.S. citizen or an alien who is authorized to work while hiring or retaining an unauthorized alien.

Section 18 amends Ala. Code 32-6-9 to include a provision that if a person is arrested for driving without a license, and the officer is unable to determine by any other means that the person has a valid driver's license, the officer shall transport the arrested person to the nearest magistrate; a reasonable effort must be made to determine the citizenship of the arrested person, and if found to be unlawfully present in the United States, the arrested person shall be considered a flight risk and must be detained until prosecution or until handed over to federal immigration authorities.

Section 27 bars Alabama courts from enforcing a contract to which a person who is unlawfully present in the United States is a party, if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into. This section does not apply to contracts for lodging for one night, contracts for the purchase of food, contracts for medical services, contracts for transportation for an alien to return to his or her country of origin, or any “contract authorized by federal law.” In court proceedings, the determination of whether an alien is unlawfully present in the United States shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c).

Section 28 requires every public elementary and secondary school in Alabama, “at the time of enrollment in kindergarten or any grade in such school,” to determine if the student “was born outside the jurisdiction of the United States or is the child” of an unlawfully present alien and qualifies for assignment to an English as second language class or other remedial program. Section 28(a)(2) provides that, in making the above determination, the school “shall rely upon presentation of the student’s original birth certificate, or a certified copy thereof.” Section 28 also requires the school or district to compile the data required by the Section and to submit the data to the State Board of Education, which must submit a public report to the legislature. However, Section 28(e) and (f) proscribe public disclosure of information obtained under the section that personally identifies a student (except for purposes permitted by 8 U.S.C. §§ 1371 and 1644), and the student enjoys a right to privacy and a civil remedy for any public disclosure of such information. Any person intending to make a public disclosure of information that is classified as confidential under this section, on the ground that such disclosure constitutes a use permitted by federal law, shall first apply to the Attorney General and receive a waiver of confidentiality from the requirements of Section 28(e).

Section 30 makes it a felony for an alien not lawfully present in the United States to enter into or attempt to enter into a “business transaction” with the State of Alabama or any political subdivision thereof. Section 30(a) defines a “business transaction” to include

applying for or renewing a license plate, driver's license, nondriver identification card, or business license. However, "business transaction" does not include applying for a marriage license. The state and any political subdivision thereof may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the U.S. Constitution or the Constitution of Alabama of 1901.

B. Private Plaintiffs' Lawsuit

In a separate lawsuit seeking to enjoin H.B. 56, the private plaintiffs sued not only the State of Alabama and Governor Robert J. Bentley but also numerous other state and local officials.⁴ The private plaintiffs argued that the entire act, and particularly Sections 10, 12, 18, 27, 28, and 30, are invalid on numerous constitutional and other grounds.⁵ But the private plaintiffs' only ground asserted for

⁴The private plaintiffs sued Robert Bentley, in his official capacity as Governor of the State of Alabama, and Luther Strange, in his official capacity as Attorney General of the State of Alabama. They also named as defendants Joseph B. Morton, State Superintendent of Education and Freida Hill, Chancellor of Postsecondary Education, as well as six school superintendents: E. Casey Wardynski, Superintendent of the Huntsville City School System; Jamie Blair, Superintendent of the Vestavia Hills City School System; Randy Fuller, Superintendent of the Shelby County Public School System; Charles D. Warren, Superintendent of the DeKalb County Public School System; Barbara W. Thompson, Superintendent of the Montgomery County Public School System; and Jeffery E. Langham, Superintendent of the Elmore County Public School System. They also name Robert L. Broussard, District Attorney for Madison County. On September 16, 2011, plaintiffs filed an Amended Complaint, which substituted Larry E. Cravin, in his official capacity as Interim State Superintendent of Education, for Morton, who retired on August 31, 2011.

⁵In their complaint and in the district court, the private plaintiffs also argued that (1) Sections 12, 18, 19, and 20 violate the Fourth Amendment; (2) Sections 8, 10, and 12 (in addition to Section 28) violate the Equal Protection Clause of the Fourteenth Amendment; (3) Sections 12, 18, 19, and 20 violate procedural due process under the Due Process Clause of the Fourteenth Amendment; (4) Sections 10, 12, 13, and 30 are vague and overbroad in violation of the Due Process Clause of the Fourteenth Amendment; (5) Section 11 effects a content-based restriction on speech relating to work and is impermissibly vague in violation of the First

purposes of their motion for injunction pending appeal as to Sections 10, 12, 18, 27, and 30 is that the entire act and those sections are preempted under the Supremacy Clause and by federal law (primarily the INA but also 42 U.S.C. § 1981 as to Section 27). The private plaintiffs' motion argues that Section 28 is not only preempted but also violates the Equal Protection Clause of the Fourteenth Amendment.

In addition to the sections of H.B. 56 challenged by the United States, the private plaintiffs challenged these provisions of the act, which are summarized as follows:

Section 8 prohibits an alien not lawfully present in the United States from enrolling in or attending any public post-secondary educational institution and requires any alien attending a public post-secondary educational institution to possess lawful permanent residence or an appropriate nonimmigrant visa.

Sections 10(e), 11(e), and 13(h) state that verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) is conclusive proof of the alien's status and that a state court may consider only the federal verification in determining whether

Amendment; (6) Section 27 unconstitutionally impairs the obligation of contracts by forbidding Alabama state courts from enforcing a contract between a party and an alien unlawfully present in the United States; (7) Sections 10(e), 11(e), and 13(h) violate the Confrontation Clause and Compulsory Process Clause of the Sixth Amendment; and (8) Sections 27 and 30 violate 42 U.S.C. § 1981 by prohibiting unlawfully present aliens from making and enforcing contracts.

Because the private plaintiffs have requested an injunction pending appeal only as to Sections 10, 12, 18, 27, 28, and 30 and based only on federal preemption as to those sections and on Equal Protection grounds as to Section 28, we have considered only those specific claims of the private plaintiffs.

an alien is lawfully present in the United States.⁶

Section 11(f) and (g) make it unlawful for an occupant of a motor vehicle stopped on a street or roadway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes traffic. Section 11(f) applies to an occupant of a motor vehicle; Section 11(g) applies to a person picked up by a motor vehicle blocking traffic.

Section 12(e) requires a state law enforcement agency to cooperate in the transfer of an unlawfully present alien to the custody of the federal government, if the federal government so requests.

Section 19 states that, if a person is charged with a crime for which bail is required or confined for any period in state, county, or municipal jail, law enforcement must make a reasonable effort to determine if the person is an alien unlawfully present in the United States.

Section 20 requires the state agency responsible for the incarceration of an unlawfully present alien convicted of a violation of state or local law to notify U.S. Immigration and Customs Enforcement and to assist in the coordination and transfer of the prisoner to the appropriate federal immigration authority.

C. Motions for Preliminary Injunction in the District Court

In the district court, the United States moved for a preliminary injunction of Sections 10, 11(a), 12(a), 13, 16, 17, 18, 27, 28, and 30 of H.B. 56. In the separate lawsuit, the private plaintiffs moved the district court for a preliminary injunction of the entire act or of Sections 8, 10(a), 10(e), 11(a), 11(e), 11(f), 11(g), 12(a) and

⁶The private plaintiffs argued that the last sentence of these subsections violated the Compulsory Process Clause of the Sixth Amendment by prohibiting an alien from offering any evidence in defense of an element of a criminal offense.

(e), 13, 18, 19, 20, 27, 28, and 30.

The parties proceeded by filing affidavits and briefs before the district court. In support of its motion for a preliminary injunction, the United States submitted, inter alia, eleven declarations, including: (1) the Declaration of William J. Burns, Deputy Secretary of State; and (2) the Declaration of Daniel H. Ragsdale, Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement.

The private plaintiffs submitted, among other documents: (1) the text of House Bill 56; (2) over forty declarations; and (3) an article entitled “Alabama Town Closely Watches New Immigration Law.”

In response, the State of Alabama presented various documents, including: (1) a Pew Hispanic Center study entitled “Unauthorized Immigrant Population: National and State Trends, 2010”; (2) the affidavit of Henry M. Redden, the Director of Information Systems for the Alabama Department of Corrections; (3) a 2002 Office of Legal Counsel memorandum on “Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations”; (4) a study by the National Education Association entitled “Rankings of the States 2010 & Estimates of School Statistics 2011”; (5) several declarations; and (6) two letters, including one written by State Superintendent of Education

Joseph B. Morton.

On August 24, 2011, the district court held a full-day hearing on the motions for a preliminary injunction. Although the district court heard the arguments of counsel, no witnesses testified at the hearing. No depositions have been filed. After the hearing but before the ruling, the private plaintiffs filed additional documents and declarations.

On August 29, 2011, the district court temporarily enjoined enforcement of H.B. 56 until September 29, 2011. However, the court noted that the temporary injunction issued solely to allow more time to consider the various challenges to H.B. 56 and was not addressing the merits of the motions for a preliminary injunction.

Subsequently, in a 115-page opinion dated September 28, 2011, the district court granted the United States' motion in part and enjoined enforcement of Sections 11(a), 13, 16, and 17. The district court denied a preliminary injunction with respect to Sections 10, 12(a), 27, 28, and 30.

In a separate 106-page order also dated September 28, 2011, the district court granted the private plaintiffs' motion in part and enjoined Sections 8, 10(e),

11(e), 11(f), and 11(g).⁷ The district court denied a preliminary injunction with respect to Sections 10(a), 12(a) and (e), 18, 19, 20, 27, 28, and 30.

By virtue of the expiration of the temporary injunction, H.B. 56, including the unenjoined Sections 10, 12, 18, 19, 20, 27, 28, and 30, went into effect on September 29, 2011. The private plaintiffs filed a notice of interlocutory appeal on September 29, 2011, and the United States filed a notice of interlocutory appeal on September 30, 2011. In the district court, both the United States and the private plaintiffs moved for an injunction pending their appeal of the district court's denial of a preliminary injunction on Sections 10(a), 12(a), 18, 27, 28, and 30. On October 5, 2011, the district court denied the motions for an injunction pending appeal.

D. Motions for Injunction Pending Appeal

On October 7, 2011, both the United States and the private plaintiffs filed the present motions for injunctions pending appeal, but only as to Sections 10(a), 12(a), 18, 27, 28, and 30.⁸ They also asked this Court to expedite consideration of

⁷In the private plaintiffs' lawsuit, the district court denied the motion for a preliminary injunction as moot with respect to Sections 11(a) and 13 because the district court enjoined enforcement of these sections in the United States' lawsuit.

⁸In the district court, the private plaintiffs moved for a preliminary injunction as to Sections 19 and 20, but the private plaintiffs did not move for an injunction pending appeal as to these Sections. Nor do the private plaintiffs move in this Court for an injunction pending appeal as to Sections 19 and 20.

the underlying appeals. On October 7, 2011, this Court immediately expedited briefing of, and oral argument on, the merits of the underlying appeal as to the denial of the preliminary injunctions of enforcement of H.B. 56. (See Order dated October 7, 2011). This order addresses only the parties' motions for an injunction pending appeal.⁹

III. STANDARD FOR INJUNCTION PENDING APPEAL

We grant the “extraordinary remedy” of an injunction pending appeal only if the petitioners can show: “(1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the intervenors unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest.” Touchston v. McDermott, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc). “A substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain, success.” Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1232 (11th Cir. 2005) (emphasis omitted). “Failure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of

⁹In this appeal, the United States, the private plaintiffs, or the State of Alabama also filed a few additional declarations, documents, and newspaper articles. While the motions panel has considered everything, we leave it to the merits panel to sort out what is properly considered as evidence on appeal.

success on the merits.” Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009). Further, “preliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.” Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990).

IV. DISCUSSION

Upon review of the record and consideration of the parties’ briefs and the district court’s orders and opinions, we GRANT IN PART and DENY IN PART the United States’ and the private plaintiffs’ motions for injunction pending appeal. We conclude that the United States and the private plaintiffs have met their burden as to all four requirements for an injunction pending appeal as to Section 10 and we therefore ENJOIN the State of Alabama’s enforcement of Section 10 pending appeal and until further order by the merits panel.

We also conclude that the United States has met its burden as to all four requirements for an injunction pending appeal as to Section 28 and we therefore

ENJOIN the State of Alabama's enforcement of Section 28 pending appeal and until further order by the merits panel. The private plaintiffs' motion for injunction pending appeal is DENIED AS MOOT as to Section 28, and thus we need not reach the standing issues.

The United States' and the private plaintiffs' motions for injunction pending appeal are DENIED as to Sections 12, 18, 27, and 30.¹⁰

Our decision does not bind the merits panel, which will consider the case after full briefing and oral argument. See 11th Cir. R. 27-1(g) ("A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it.").

MOTIONS GRANTED IN PART AND DENIED IN PART.

¹⁰The United States' "Motion for Temporary Injunction Pending Full Consideration" of the motions for injunction pending appeal is DENIED AS MOOT.

BARCKETT, Circuit Judge, concurring in part and dissenting in part:

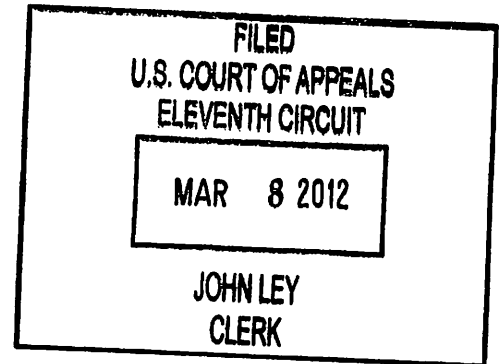
I agree that Sections 10 and 28 should be enjoined and that Sections 27 and 30 should not be enjoined. However, I would find that the United States and the private plaintiffs have met the requirements for an injunction pending appeal as to Sections 12 and 18.

Exhibit C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-14532-CC



UNITED STATES OF AMERICA,

Plaintiff - Appellant
Cross Appellee,

versus

STATE OF ALABAMA,
GOVERNOR OF ALABAMA,

Defendants - Appellees
Cross Appellants,

No. 11-14535-CC

HISPANIC INTEREST COALITION OF ALABAMA,
AIDS ACTION COALITION, et al.

Plaintiffs - Appellants
Cross Appellees,

versus

GOVERNOR OF ALABAMA,
ATTORNEY GENERAL, STATE OF ALABAMA, et al.,

Defendants - Appellees
Cross Appellants,

SUPERINTENDENT OF HUNTSVILLE CITY SCHOOL SYSTEM, et al.,

Defendants - Appellees,

Appeals from the United States District Court
for the Northern District of Alabama

(March 8, 2012)

Before WILSON and MARTIN, Circuit Judges, and VOORHEES,* District Judge.

BY THE COURT:

These appeals involve challenges to the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Ala. Laws Act 2011-535 (H.B. 56). Upon consideration of the parties' briefs and the cited case law, and after having the benefit of oral argument, we modify the injunction entered by this court on October 14, 2011. *See United States v. Alabama*, No. 11-14532, 2011 WL 4863957 (order of motions panel granting in part and denying in part plaintiffs' motion for injunction pending appeal); 11th Cir. R. 27-1(g) (permitting the merits panel to "alter, amend, or vacate" the prior ruling of a motions panel).

We conclude that the plaintiffs in these matters have met their burden as to

* Honorable Richard L. Voorhees, United States District Judge for the Western District of North Carolina, sitting by designation.

two additional sections of H.B. 56. We therefore expand the October 14, 2011 order and hereby ENJOIN the State of Alabama's enforcement of Section 27 and Section 30 of H.B. 56 pending complete resolution of these appeals.

SO ORDERED.